No. 05-553

In The

Supreme Court of the United States

SPECTOR GADON & ROSEN, P.C.
and ALAN B. EPSTEIN, ESQUIRE,

Petitioners,

V.

NANCY KANTER, ESQUIRE,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a civil defendant deprived of due process by arbitrary and capricious judicial action including a trial court's *sua sponte* award of substantial punitive damages to a plaintiff despite a jury verdict in favor of defendants on punitive damages, and the denial of appellate review by *sua sponte* application of a newly announced rule, contrary to all existing precedent, that a party raising too many claims of error waives all claims on appeal?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) and Rule 29.6, the following list identifies all of the parties before the Superior Court of Pennsylvania.

Petitioner, Spector Gadon & Rosen, P.C., appellant below, is a law firm operated as a professional corporation which petitioned for and received an award of attorneys' fees under 42 U.S.C. § 1988 in a civil right action in the United States District Court for the Eastern District of Pennsylvania. Spector Gadon & Rosen, P.C. has no parent corporation and no publicly traded company owns any stock in the firm.

Petitioner, Alan B. Epstein, Esquire, appellant below, is an attorney at law, licensed to practice in the Commonwealth of Pennsylvania, who successfully litigated a civil rights action to settlement on behalf of a minor, Tara M., acting by and through the minor's guardian, in the United States District Court for the Eastern District of Pennsylvania. Mr. Epstein undertook representation while a partner at the law firm of Jablon Epstein & Wolf; however, at the time of settlement, Mr. Epstein was employed by Spector Gadon & Rosen, P.C.

Respondent, Nancy Kanter, appellee below, is an attorney at law, licensed to practice in the Commonwealth of Pennsylvania. Ms. Kanter was the court-appointed guardian for a minor, Tara M., and in her capacity as guardian retained Jablon Epstein & Wolf to represent the minor in the aforementioned civil rights action. Ms. Kanter was named as the plaintiff in the civil rights litigation in her capacity as guardian, and she was also added as a third party defendant in the action. After settlement, Ms. Kanter demanded a

PARTIES TO THE PROCEEDINGS BELOW – Continued

referral fee of one-third of the fees awarded by the district court. When Mr. Epstein and Spector Gadon & Rosen, P.C. objected to payment of any referral fee, Ms. Kanter sued them for breach of contract and conversion.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

Spector Gadon & Rosen, P.C. and Alan B. Epstein, Esquire, respectfully petition for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania in this case.

OPINIONS BELOW

The decision of the Superior Court of Pennsylvania, reported at 866 A.2d 394 (Pa.Super. 2004), is reprinted at App. 1. The Superior Court's unreported order denying petitioners' requests for reconsideration and/or reargument is reprinted at App. 17. The unreported order of the Supreme Court of Pennsylvania, denying petitioners' petitions for allowance of appeal, is reprinted at App. 96. The decision of the Court of Common Pleas of Philadelphia County, Pennsylvania, reported at 66 D. & C. 4th 353 (Phila. Cty. 2004), is reprinted at App. 19.

JURISDICTION

The judgment of the Superior Court of Pennsylvania issued on December 10, 2004. The Superior Court denied reconsideration and/or reargument of the judgment on February 11, 2005. The Supreme Court of Pennsylvania denied discretionary review of the judgment of the Superior Court by its Order of August 2, 2005, denying petitioners' petitions for allowance of appeal. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the United States Constitution, which states: "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

STATEMENT OF THE CASE

Background.

In January, 1991, the Philadelphia Court of Common Pleas appointed respondent, Nancy Kanter, as the "child advocate" for a minor, "Tara M.," whom the City of Philadelphia had placed in foster care. The child was physically abused and tortured by her City-selected foster parents who were criminally prosecuted. Respondent was appointed as guardian for Tara M. and met with petitioner Alan B. Epstein, Esquire to discuss retaining his firm, Jablon, Epstein, Drucker & Wolf, to represent Tara M. in a civil rights action against the City. App. 1-2. The Jablon Firm accepted the case, and respondent, in her capacity as Tara M.'s guardian, executed a written fee agreement under which the Jablon Firm would receive a contingency fee from any recovery on behalf of the minor. No provision was made for a referral fee to respondent. *Id.*

The Jablon firm subsequently brought a federal court action on Tara M.'s behalf against the City, in which respondent, in her fiduciary capacity as Tara M.'s guardian, was the named plaintiff. The City subsequently joined respondent as a third-party defendant. App. 68.

After the Jablon firm was disbanded and petitioner Epstein joined petitioner Spector Gadon & Rosen, P.C., the City settled the Tara M. suit for $4.3 million, $10,000 of which was contributed by respondent's malpractice insurer. Upon petition, the district court awarded the Spector Firm a $1.29 million fee. App. 2, 69.

Despite the absence of any reference to a referral fee in the written fee agreement and despite respondent's retention of counsel in her capacity as a fiduciary to Tara M., at the time of the successful settlement of the civil rights action, respondent claimed that petitioner Epstein had orally promised her one-third of his firm's fee. Petitioner Epstein denied making any such promise. Respondent demanded that petitioners pay her a $431,000 referral fee. Her demand was rejected by petitioners, and respondent sued petitioners in the Court of Common Pleas of Philadelphia County for breach of oral contract and conversion. App. 2, 69.

Proceedings below.

After a trial before a judge and jury, the jury found for respondent on her claims for conversion and breach of contract and awarded compensatory damages of $215,500. App. 2. Because of the jury's verdict on respondent's tort-based conversion claim, the issue of punitive damages was tried to the jury. The jury returned a verdict finding neither petitioner liable for punitive damages. App. 2, 19-20.

Post-trial, the trial court not only ordered an additur doubling the jury's award of compensatory damages, and added pre- and post-judgment interest, but also *sua sponte* granted respondent extraordinary and unprecedented relief in the form of an option of a new trial on punitive damages or accepting an award of punitive damages in the

amount of $645,000. Respondent opted to receive the award of punitive damages without being required to undergo a new jury trial on the issue. In addition, the trial court added $124,219.86 in attorneys' fees, and $87,000 in accrued fines for contempt, all arising from petitioners' purported failure to "comply with the Court's orders relating to punitive damages." App. 26-27. In total, the trial court increased the jury's verdict from $215,500 to a total judgment of almost $1.3 million. Petitioners appealed to the Pennsylvania Superior Court.

The trial court ordered petitioners to submit statements of issues complained of on appeal in accordance with Pennsylvania Rule of Appellate Procedure 1925(b).[1] Recognizing the rule in Pennsylvania that any issue not raised in a Rule 1925(b) statement is waived on appeal, and in view of the complex and convoluted history of the post-trial proceedings, each petitioner filed comprehensive statements of the issues on appeal, wholly consistent with Rule 1925(b). Petitioners' 1925(b) statements in their entirety, including their claim of a denial of due process by reason of the trial court's *sua sponte* imposition of punitive damages after the jury's verdict for petitioners on that issue, are set forth in the trial court's Opinion. App. 33-62. *See specifically* App. 33-35, 48-50.

Eight months after having received petitioners' Rule 1925(b) statements, the trial court issued an 85-page Opinion addressing fully the issues raised by petitioners.

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[1] Pa.R.A.P. 1925(b) provides: "The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of matters complained of on appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of."

With respect to the trial court's *sua sponte* award of punitive damages without the requirement of a new trial, the trial court acknowledged that: "Ordinarily, the finding of the jury that there is no liability for punitive damages would preclude us from granting a new trial as to punitive damages, merely because not all pertinent financial information regarding assets was disclosed by the defendants and presented to the jury." App. 83. The trial court, however, ignored its own stated limitation in the law, incongruously asserting that petitioners purportedly misled the jury by making statements during the punitive damage phase of the trial that petitioner, the Spector Firm, would pay any final judgment. The trial court opined that the Spector Firm acted contrary to the statements made to the jury by taking an appeal, and found that the statements "had a very great likelihood of affecting the jury's determination that there was no liability for punitive damages." App. 84.

In addition, based on its acknowledged non-record, post-trial, *ex parte* meeting with the jurors, the trial court cited alleged "delaying tactics" by petitioners that "wore out the jurors to such an extent that they could no longer give the plaintiff their fair attention when the punitive damages phase of the trial began nine trial days after jury selection." App. 87. Finally, the trial court cited petitioners' alleged defiance of its order pertaining to discovery of petitioners' finances during the punitive damage phase. App. 87.

Based on the foregoing, the trial court "sua sponte offered plaintiff an alternative . . . [*i.e.*,] . . . Plaintiff could receive a new trial on punitive damages (and expend additional resources on both the trial and-continuation of the battle to get defendants to disclose their assets) or she could elect to receive the sum of $645,000 in punitive

damages . . . Plaintiff elected to receive $645,000 in lieu of a new trial on punitive damages." App. 91. The trial court's only rationale for this unprecedented remedy was that: "The election formulated by the court and accepted by the plaintiff was appropriate under the unique circumstances of this case." *Id.*

The trial court also remarked in its Opinion, without any further discussion, that the number of issues raised in petitioners' respective Rule 1925(b) statements was "another attempt to overwhelm and overburden this Court and pervert the court system." App. 63. Significantly, the trial court did not identify a single issue that was in any way frivolous or advanced in bad faith. Rather, the trial court's Opinion fully addressed the merits of the substantive issues raised in petitioners' Rule 1925(b) statements. App. 64-95.

Petitioner, the Spector Firm, raised seven discrete issues on appeal to the Superior Court of Pennsylvania, each of which was addressed and analyzed fully in the trial court's Opinion, including petitioners' claim of a denial of due process by the trial court's award of punitive damages.[2] App. 98-105. Although the trial court had

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[2] Specifically, in its appellate brief, petitioner, the Spector Firm, raised as issues, whether: (1) as Tara M.'s guardian, respondent was precluded as a matter of basic fiduciary law from profiting from Tara M.'s case; (2) the trial court improperly granted an additur where evidence supported the jury's compensatory damages award; (3) the trial court erred, and indeed deprived defendants of fundamental constitutional rights, by rejecting the jury's verdict on punitive damages and offering respondent the option of a new trial on punitive damages or the sum of $645,000; (4) the trial court erred in ordering post-trial discovery on petitioners' financial status, where the jury had declined to award punitive damages; (5) the discovery orders issued during the course of the trial were too vague and ambiguous to permit an award of sanctions; (6) the trial court erred in imposing attorneys'

(Continued on following page)

addressed and analyzed each of these issues in some depth, and in a manner certainly sufficient to permit effective appellate review, the Superior Court nonetheless concluded, *sua sponte*, that defendants waived their appellate rights because their respective Rule 1925(b) statements filed in the trial court were "too voluminous," despite the absence of any finding that any issue raised was raised frivolously or in bad faith. App. 12-14. The Superior Court so held despite the fact that only seven issues were raised on appeal. Moreover, respondent never objected and never raised any claim of waiver on appeal, and the issue was never mentioned at oral argument, either by respondent's counsel or, indeed, by the Superior Court panel.

Petitioners sought reargument and/or reconsideration of the Superior Court's order contending, *inter alia*, that they were deprived of due process by reason of the trial court's ruling on punitive damages, as well as the Superior Court's retrospective application of a newly created rule of waiver. App. 107-110. Reargument was denied by the Superior Court by Order without Opinion on February 11, 2005. App. 17. Petitioners' petitions for allowance of appeal to the Pennsylvania Supreme Court were denied. App. 96. The constitutional challenge was preserved in petitioner, the Spector Firm's, petition to the Pennsylvania Supreme Court. App. 112-116.

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fees without any hearing or evidence supporting such an award; and (7) the trial court's post-appeal orders were void for lack of jurisdiction. App. 9-11. Petitioner Epstein presented four issues, which incorporated additional sub-issues, and at argument, joined in all issues raised by petitioner, the Spector Firm.

REASONS FOR GRANTING THE PETITION

The trial court *sua sponte* awarded punitive damages in the amount of $645,000 to respondent – *after a jury verdict in favor of petitioners on liability for punitive damages.* Part of the basis for the trial court's action is a post-trial, non-record, *ex parte* meeting with the jury. The Superior Court of Pennsylvania denied any review of this egregious deprivation of petitioners' rights to due process and a jury trial, as well as several other meritorious issues, by announcing, *sua sponte*, and applying retroactively, a new rule declaring a party waives all issues on appeal when it raises too many claims of error in the trial court, without any finding that any issue is raised frivolously or in bad faith.

Certiorari should be granted because this case represents a breach of the fundamental protections of due process, a gross miscarriage of justice, and outrageously arbitrary and capricious conduct by the courts of Pennsylvania. In this case, the state trial court and appellate court have violated federal due process standards by imposing punitive sanctions on petitioners without even a scintilla of basic fairness.

THE TRIAL COURT'S *SUA SPONTE* IMPOSITION OF PUNITIVE DAMAGES AGAINST PETITIONERS FOLLOWING A JURY VERDICT IN THEIR FAVOR ON PUNITIVE DAMAGE LIABILITY, COMPOUNDED BY THE APPELLATE COURT'S REFUSAL TO REVIEW THE MERITS OF PETITIONERS' APPEAL, REPRESENTS AN ARBITRARY AND CAPRICIOUS DENIAL OF DUE PROCESS OF LAW

In the last 15 years, this Court has addressed a myriad of issues regarding the substantive and procedural

due process requirements essential to a constitutionally permissible award of punitive damages. Never before has this Court been presented with a case such as this, where all procedural and substantive protections were cast aside and where a trial court unilaterally disregarded a contrary jury verdict, imposed punitive damages on a prevailing party, and the state appellate courts denied any appellate review whatsoever.

In *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994), this Court held that "a decision to punish a tortfeasor by means of an exaction of exemplary damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment," *Oberg*, 512 U.S. at 434-35, and invalidated an amendment to the Oregon state constitution that limited review of the amount of a punitive damage to instances where the court can affirmatively say that there is no evidence to support the verdict. This Court noted that, in the normal course, common law procedures are sufficient to protect fundamental property and liberty interests, but "there are a handful of cases in which a party has been deprived of liberty or property without the safeguards of common law procedure . . . [and that] . . . [w]hen the absent procedures would have provided protection against arbitrary and inaccurate adjudication, this Court has not hesitated to find the proceedings violative of due process." *Oberg*, 512 U.S. at 430.

This Court's decision in *Oberg* followed the decision in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991), which analyzed Alabama's state court procedures for scrutinizing claims of excessive punitive damage awards and found those procedures passed constitutional muster. Those procedures included (1) proper

instructions to the jury, (2) post-trial review of a jury's award of punitive damages by the trial court considering enumerated factors, (3) comparative analysis by the state appellate courts, and (4) analysis by the appellate courts utilizing detailed substantive standards. *Haslip*, 499 U.S. at 19-21. In contrast, the present case afforded petitioners no procedural protections whatsoever.

Indeed, the instant case presents an inverse proposition to the normal punitive damage case presented to this Court. The question is not whether the state court's procedures provided sufficient procedural protection against the vicissitudes of an irrational jury in the award of punitive damages, but rather whether the state court procedures utilized – permitting a court to award punitive damages *sua sponte* without any appellate review whatsoever – herein were so arbitrary and capricious as to themselves violate due process.

The imposition of punitive damages against petitioners was the result of a series of due process deprivations that coalesced in unparalleled fashion. First, the trial court made an award of punitive damages in violation of petitioners' right to have that issue determined by a jury. Second, the trial court made an unprecedented award of punitive damages *sua sponte*, without any request by respondent for the court itself to award punitive damages, and without any notice or opportunity for petitioners to be heard. Third, the trial court revealed in its Opinion released two years after the trial that part of its basis for the award of punitive damages were statements made during a post-trial, non-record, *ex parte* meeting between the trial judge and the jury. Fourth, petitioners were deprived of any appellate review whatsoever when the state appellate court found that petitioners had waived all appellate

issues based on a newly announced and retroactively applied rule of waiver of all appellate issues when too many claims of trial court error are made – without reference to the good faith or validity of the claims of error.

Each of these circumstances constitutes a denial of petitioners' due process rights. Together, they represent an affront to the basic notions of fairness that underlie our system of justice.

A. Petitioners Were Arbitrarily And Capriciously Deprived Of Their Right To A Jury Trial On Respondent's Claim For Punitive Damages

The trial jury found for petitioners on the issue of punitive damages, and respondent asked for a new trial on punitive damages, asserting that petitioners failed to provide her with requested financial information. The trial court awarded respondent $645,000 in punitive damages, without requiring a new trial, on the basis that "the defendants willfully refused all of our orders directing them to participate in post-verdict discovery. The recalcitrant positions taken by the defendants required that we formulate a unique solution." App. 91. The trial court's "unique solution" cannot be reconciled with fundamental notions of due process.

Assuming *arguendo* that respondent's request for a new trial on the issue of punitive damages was meritorious, the proper relief would be a new trial on punitive damages. Any such new trial would be before a jury, as was the first trial. The trial court's action deprived petitioners of their right

under the Pennsylvania Constitution to have the punitive damage issue tried to a jury.[3] The trial court's deprivation of that right to a jury determination of punitive damages, although guaranteed by state law, is protected as well by federal due process, and as such, the trial court's arbitrary and capricious deprivation of petitioners' guaranteed due process right violates the federal constitution.

State law may create an interest protected by the due process clause of the Fourteenth Amendment. *Sandlin v. O'Connor*, 515 U.S. 472, 483-84 (1995). This Court has held that due process is violated where a defendant is deprived of a state-conferred right to a jury determination of criminal punishment by improper jury instructions. *Hicks v. Oklahoma*, 447 U.S. 343, 345-46 (1980). Petitioners, like the criminal defendant in *Hicks*, had a "substantial and legitimate expectation" that they would be deprived of their property right only "to the extent determined by the jury in the exercise of its . . . discretion." *Hicks*, 447 U.S. at 346. The trial court's unilateral abrogation of petitioners' right to a jury determination on liability for punitive damages, as well as an initial determination

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[3] Under Pennsylvania law, upon request of a party, punitive damages are decided by a jury, in accordance with the Pennsylvania Constitution. Pa. Const., Art. 1, section 6 (the right to "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate"). The right to a jury trial enshrined in the state constitution preserves the right to a jury that existed at the time the constitution was adopted. *Wertz v. Chapman Twp.*, 709 A.2d 428 (Pa. Cmwlth. 1998), *aff'd*, 559 Pa. 630, 741 A.2d 1272 (1998). Liability for punitive damages was an issue for the jury at the time of the adoption of the state constitution. *Mishoe v. Erie Insurance Co.*, 573 Pa. 267, 277, 824 A.2d 1153, 1158 (2003). There can be no question herein that petitioners sought to have the issue of punitive damages tried to a jury, and indeed, a jury verdict was rendered in their favor, absolving them of liability for punitive damages.

by the jury of the amount of punitive damages, assuming liability was found, was an "arbitrary deprivation" and thus a denial of due process of law. *Id.* Although in *Hicks*, the due process right implicated a criminal defendant's liberty interest, the petitioners' property interests likewise are protected from the arbitrary imposition of punitive damages, as this Court has held that such interests are subject to the restrictions of both procedural and substantive due process. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003).

The trial court's action in unilaterally awarding punitive damages to respondent without requiring a new trial, and as punishment for alleged post-trial discovery violations, is an arbitrary and capricious action that deprived petitioners of their federal due process rights.

B. The Trial Court's *Sua Sponte* Award Of Punitive Damages Was Made Without Any Notice To Petitioners And Without Any Opportunity For Petitioners To Be Heard

Until the trial court issued its Order in March, 2003, almost one year after the trial, petitioners were totally unaware that the trial court had contemplated permitting respondent to recover punitive damages without undergoing a new trial. Not only had no such request ever been made by respondent, the trial court had never suggested that it would deprive petitioners of a jury trial on the issue. Research by counsel has failed to disclose any other case in American jurisprudence wherein a trial court has itself unilaterally usurped the jury's role and imposed punitive damages against a party that was the verdict winner at the jury trial on the issue of liability for punitive damages.

Moreover, it is a fundamental tenet of due process that a party receive notice and an opportunity to be heard before being deprived of life, liberty or property. *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The trial court's action in *sua sponte* imposing punitive damages without any request for the trial court to do so and without any notice to petitioners or opportunity for petitioners to be heard violates due process.

C. The Trial Court Impermissibly Based Its Award Of Punitive Damages In Part On A Non-Record, Post-Trial, *Ex Parte* Meeting With The Jurors

In its February 2004 Opinion, the trial court disclosed for the first time that it conducted a non-record, post-trial, *ex parte* meeting with the jurors. App. 97. Further, it was evident that the trial judge relied on information that he allegedly learned during this meeting to bolster his rationale for *sua sponte* awarding punitive damages to respondent, despite the jury's verdict to the contrary.

The due process implications of the trial court's action are self-evident. The trial judge acted on information that was received outside the presence of counsel and the parties and as to which there exists no record save a footnote in the trial court's Opinion. Petitioners had no opportunity to hear what statements were allegedly made by one, some, or all of the jurors and certainly no opportunity to challenge those statements through cross-examination or the offering of contrary "evidence." Moreover, petitioners, having received no notice of the receipt of this information or any record of the information received, were unable to challenge in any meaningful fashion the trial judge's interpretation of that information. In no event, does the receipt of

such information allow the trial judge to bypass the jury and *sua sponte* award punitive damages.

D. Petitioners Were Refused Any Appellate Review Of The Trial Court's Unilateral, *Sua Sponte* Imposition Of Punitive Damages As A Result Of The Appellate Court's *Sua Sponte*, Retroactive Application Of A Rule Of Waiver That Violates Petitioners' Due Process Rights

Petitioners arbitrarily and capriciously were denied their right to appellate review of the trial court's award of punitive damages by reason of the state appellate court's application of a newly created rule of waiver, premised on petitioners having raised too many claims of error in the trial court. Incredibly, the Superior Court panel[4] created a rule that focuses on the mere number of issues without any consideration of the merit of the issues or the good faith of the party raising the issues. Such a rule indiscriminately punishes losing parties in complex or protracted matters, and rewards trial courts that routinely commit error during their proceedings.

Rather than addressing the merits of petitioners' respective appeals, as the trial court had done, the Superior Court panel declared, *sua sponte* and without affording petitioners the opportunity to brief or argue the issue,

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[4] The Superior Court of Pennsylvania is comprised of 15 commissioned judges, Pa. Const. Art. 5, sec. 3; 42 Pa.C.S. § 541, and an indeterminate number of senior judges appointed by the Supreme Court of Pennsylvania. The Superior Court sits in panels of three judges randomly appointed by the President Judge of the Superior Court, to hear assigned cases. Superior Court Internal Operating Procedures, §§ 65.5 A. and B.

that petitioners had waived all appellate rights by submitting Rule 1925(b) statements to the trial court that the Superior Court panel deemed "too voluminous." App. 12-14. In so holding, the Superior Court panel created a new rule of appellate procedure, and applied that new rule retroactively to petitioners, abrogating their fundamental right of appellate review as established by the Pennsylvania Constitution, without any notice or opportunity to be heard. The subject of Rule 1925(b) and waiver was never addressed by any Superior Court panel member, or by respondent's counsel, at oral argument. Argument was limited exclusively to the substantive issues raised by petitioners in their respective appellate briefs. The issue was addressed for the first time in the Superior Court's Opinion, and thus, petitioners never had any notice of or opportunity to address the issue.

A party has a right to appeal under the Pennsylvania Constitution. Pa. Const., Art. 5, section 9 ("there shall be a right of appeal from a court of record . . . to a court of record or an appellate court, the selection of such court to be provided by law . . . "). If a full and fair trial on the merits is provided, the due process clause does not require a state to provide an appellate remedy. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). Herein, however, petitioners have not received a full and fair trial on the merits of the punitive damage claim and therefore due process is implicated. Moreover, where a right to appeal is provided, it cannot, consistent with due process or equal protection, be denied arbitrarily and capriciously. *Lindsey*, 405 U.S. at 77.

Petitioners were deprived of due process by reason of the denial of their appeal in three regards. First, petitioners did not receive a full and fair trial on the merits of the punitive damage claim. Rather, they were deprived of their right to a jury trial on punitive damages without any notice

or opportunity to be heard in light of the trial court's unprecedented, *sua sponte* award of punitive damages based in part on information improperly received post-trial and *ex parte* in a non-record proceeding. Having been deprived of a full and fair trial, due process requires that petitioners be provided with appellate review.

Second, the state appellate court announced and retroactively applied to petitioners a new rule of waiver without any notice to petitioners. The state appellate rule, Pa.R.A.P. 1925(b), requires only a "concise" statement of matters complained of on appeal. The issues presented in petitioners' Rule 1925(b) statements, while necessarily numerous, were indeed "concise." Moreover, the rule is designed to assist the trial court in identifying the issues to be addressed in its Opinion. Here, the trial court issued an 85 page Opinion addressing petitioners' issues. On appeal, petitioners, having the benefit of the trial court's Opinion, honed their focus to the most significant issues. Neither the trial court, nor the Superior Court, ever contended that any issue was raised frivolously or in bad faith. Nonetheless, the Superior Court panel *sua sponte* made a determination that petitioners' Rule 1925 statements were not "concise," but in doing so gave no indication as to what was or was not encompassed within its definition of "concise." More significantly, the Superior Court panel arrogated to itself the unbridled discretion in any case, regardless of the number of issues raised or the merit of those issues, to deem that (1) too many issues were raised in the trial court, and (2) all issues are waived on appeal.

The rule announced by this Superior Court panel will necessarily be applied in a discriminatory fashion. No guidance is provided as to what is or is not "concise" for purposes of compliance with Rule 1925(b), thereby ensuring

the likelihood of inconsistent results – particularly when the imprecise rule will be applied by a myriad of separate panels of the Superior Court. Indeed, in prior cases, other panels of the Superior Court found no waiver when as many as 71 issues were submitted in a Rule 1925(b) statement.[5] Yet, herein petitioners each raised fewer issues and a waiver was found. Thus, it becomes apparent that the new rule of waiver has been, and can be, applied arbitrarily and capriciously and thereby violates due process. Further, by retroactively applying the new rule in this case, *sua sponte*, and without any notice to them, petitioners have been subjected to an arbitrary and capricious denial of their right to appellate review.[6]

Third, state precedents instructed appellate counsel that (1) an issue not preserved in a Rule 1925 statement is waived,[7] (2) an issue stated in a manner so vague that a court cannot determine its import is also waived,[8] and (3)

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[5] *Commonwealth v. Donahue*, 428 Pa.Super. 259, 630 A.2d 1238 (1993) (a different panel of the Superior Court reversed a trial court finding of waiver where 71 issues were raised); *Debbs v. Chrysler Corporation*, 810 A.2d 137, 141 (Pa.Super. 2002) (a different panel of the Superior Court complimented counsel on the "superb briefs that effectively addressed the critical issues before us" where party included 116 issues in its Rule 1925(b) statement); *Omicron v. Weiner*, 860 A.2d 554 (Pa.Super. 2004) (same Superior Court panel that refused to address petitioners' appeal, in a case argued the same day as petitioners' appeal, addressed all issues with no finding of waiver despite party raising 12 issues in his Rule 1925(b) statement, and in a 13th paragraph incorporating appellant's 103 paragraph post-trial motion).

[6] Importantly, neither the trial court, nor the Superior Court, identified a single issue raised by either petitioner as being frivolous or in any way inappropriate.

[7] *Commonwealth v. Lord*, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998).

[8] *Commonwealth v. Silver*, 499 Pa. 228, 238, 452 A.2d 1328, 1333 (1982).

waiver will *not* be found where a large number of issues are raised in a Rule 1925(b) statement. *See* footnote 5 *infra*. By introducing a new rule of waiver where the appellate court decides that too many issues were raised in the trial court, without specifying what constitutes too many issues, the Superior Court panel effectively has given the Pennsylvania appellate courts *carte blanche* to dismiss virtually any appeal. The new rule announced by the court is not only at odds with prior law, it is so vague that it fails to provide any guidance to litigants as to its requirements – again constituting a denial of due process. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

In sum, Petitioners were denied due process by the state trial court and appellate court in the denial of (1) their right to a jury trial on punitive damages, (2) their right to notice and an opportunity to be heard as to the trial court's denial of their right to a jury trial, (3) their right to notice and an opportunity to be heard as to the basis for the punitive damage award, (4) their right to know and confront the evidence being considered by the trial court in imposing punitive damages, (5) their right to a record of the *ex parte* proceedings by which the trial court obtained information which formed in part the basis for its decision imposing punitive damages on petitioners, (6) their right to appellate review of the imposition of punitive damages, and (7) their notice or opportunity to be heard with respect to the waiver issue that was imposed *sua sponte* and retroactively by the state appellate court. Because "the absent procedures would have provided protection against arbitrary and inaccurate adjudication," this Court should not hesitate to find the proceedings violative of due process. *Oberg*, 512 U.S. at 430.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted. In the alternative, petitioners request, pursuant to Supreme Court Rule 16.1, that this Court order a summary disposition of the merits of this matter by vacating the judgment of the Superior Court of Pennsylvania and remanding the matter back to the Superior Court for consideration of the issues raised by petitioners in their appeal to that court.

Respectfully submitted,

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October 28, 2005

866 A.2d 394

Superior Court of Pennsylvania.
Nancy KANTER, Esquire, Appellee
v.
Alan B. EPSTEIN, Esquire, and Spector Gadon & Rosen, Appellants.
Appeal of: Spector, Gadon & Rosen
Appeal of: Alan B. Epstein, Esquire
Nancy Kanter, Esquire, Appellee
v.
Alan B. Epstein, Esquire, and Spector Gadon & Rosen, P.C. Appellants
Appeal of: Spector, Gadon & Rosen and Alan B. Epstein, Esquire
Nancy Kanter, Esquire, Appellant
v.
Alan B. Epstein, Esquire, and Spector Gadon & Rosen, Appellees
Appeal of: Nancy Kanter, Esquire

Argued Aug. 31, 2004.
Filed Dec. 10, 2004.
Reargument Denied Feb. 11, 2005.

Richard A. Sprague, Philadelphia, for Spector Gadon & Rosen.

G. Alexander Bochetto, Philadelphia, for Kanter.

Gabriel L. Bevilacqua, Philadelphia, for Epstein.

Before: MUSMANNO, OLSZEWSKI and POPOVICH, JJ.

OPINION BY MUSMANNO, J.:

¶ 1 These consolidated appeals arise out of a dispute over a fee agreement. Nancy Kanter, Esquire ("Kanter") referred a case to Alan B. Epstein, Esquire ("Epstein"). The

case involved a claim by a child in the foster system who was abused by her prospective adoptive foster parents (the "Tara M. case"). Kanter had served as a guardian *ad litem* for the child. When Kanter referred the case to Epstein, he agreed to pay her a referral fee. However, this agreement was not reduced to writing. Subsequently, Epstein joined the firm of Spector Gadon and Rosen, P.C. ("SGR") while he was handling the Tara M. case. Eventually, the Tara M. case was settled for $4,310,000. From that amount, Epstein realized attorney's fees of $1,293,000. Kanter claimed that she was entitled to a referral fee of $431,000. However, Epstein and SGR refused to pay Kanter a referral fee.

¶ 2 Kanter filed suit to recover the unpaid referral fee, as well as punitive damages, based upon her allegation that Epstein and SGR (collectively, "the Defendants") engaged in outrageous, malicious, wanton, reckless, willful, or oppressive behavior. The suit that followed was very contentious. On May 9, 2002, the jury rendered a verdict in favor of Kanter, but awarded her only $215,500. The punitive damages aspect of the case was tried on May 9, 2002. After several days of deliberation, the jury returned a verdict of no liability on the basis of the punitive damages claim.

¶ 3 Kanter filed a Motion for sanctions on May 14, 2002, and a post-trial Motion on May 17, 2002. The Defendants filed respective post-trial Motions on May 23, 2002. On August 16, 2002, counsel for SGR informed the court that she would be taking a pre-paid vacation and requested that the briefing schedule be adjusted to accommodate her vacation. As a result, counsel for the parties executed a

written agreement to extend the Rule 227.4 deadline.[1] Arguments for the post-trial Motions and Motion for sanctions were held on November 25, 2002. At that time, the trial judge initiated a discussion concerning the Rule 227.4 deadline. Following on-the-record discussions, the trial court summarized the agreement of all parties that the Rule 227.4 deadline would be extended until March 14, 2003. Counsel for the Defendants explicitly agreed on the record to this extension. Thereafter, the contentious nature of this lawsuit intensified. The trial judge issued various case management and discovery Orders, as well as a sanctions Order against the Defendants.

¶ 4 Despite the fact that they had executed a written agreement and had agreed on the record to extend the Rule 227.4 deadline until March 14, 2003, the Defendants filed a praecipe to enter judgment on January 8, 2003, and judgment was entered that same day. The Defendants filed Notices of appeal on January 9, 2003, at 186 EDA 2003

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[1] Rule 227.4 provides in pertinent part:

> In addition to the provisions of any Rule of Civil Procedure or Act of Assembly authorizing the prothonotary to enter judgment upon praecipe of a party, the prothonotary shall, upon praecipe of a party:
>
> (1) enter judgment upon the verdict of a jury or the decision of a judge following a trial without jury, if
>
> * * *
>
> (b) one or more timely post-trial motions are filed and the court does not enter an order disposing of all motions within one hundred twenty days after the filing of the first motion. A judgment entered pursuant to this subparagraph shall be final as to all parties and all issues and shall not be subject to reconsideration. . . .
>
> Pa.R.C.P. 227.4.

and 187 EDA 2003. Thereafter, Kanter filed a Motion to Quash, as well as her own Notice of appeal at 1161 EDA 2003, which she notes will be withdrawn if her Motion to quash is granted.

¶ 5 After the Defendants filed their Notices of appeal, the trial court continued to address the pending post-trial, discovery, and sanctions motions. The trial court then imposed sanctions upon both Defendants for their failure to comply with the various court Orders. The trial court ultimately issued an Order dated March 10, 2003, in which the trial court denied the Defendants' post-trial Motions and granted Kanter's post-trial Motion, in part. Essentially, the trial court granted: (1) Kanter's request for *additur,* increasing the award to $431,000; (2) pre-and post-judgment interest; (3) Kanter's request for punitive damages; and (4) Kanter's Motion for sanctions. The Defendants filed a joint Notice of appeal from this Order at 924 EDA 2003.

¶ 6 Before reaching the merits of these consolidated appeals, we must first consider the Motion to quash filed by Kanter. Kanter argues that the Defendants' appeals at 186 and 187 EDA 2003 should be quashed as the parties had agreed to extend the Rule 227.4 deadline. In opposition to Kanter's Motion to Quash, the Defendants assert that there was no agreement to extend the Rule 227.4 deadline until March 14, 2003. The Defendants base their position on Philadelphia Local Rule 227, which requires that any agreement to waive or extend the Rule 227.4 deadline be in writing. The Defendants contend that no valid extension until March 14, 2003 existed, as the agreement was not in writing as required by local Rule 227. They further contend that the on-the-record discussion does not

evidence their intentions to extend the deadline. We disagree.

¶ 7 Upon our review of the November 25, 2002 transcript, it is clear that the Defendants agreed to extend the Rule 227.4 deadline until March 14, 2003. While Rule 227.4 enables the parties to enter judgment where the trial court has not ruled upon post-trial motions within 120 days of the filing of the motions, Rule 227.4 is optional. *Pentarek v. Christy,* 854 A.2d 970, 973 (Pa.Super.2004) (recognizing that the Rule 227.4 deadline is optional and that the parties may elect to wait for the trial court's ruling).

¶ 8 In this case, the record reveals that the parties explicitly agreed to extend the 120 day deadline until March 14, 2003, and to await the trial court's ruling on the post-trial Motions. Upon the initial request of SGR, the parties signed a written agreement wherein all parties agreed to extend the Rule 227.4 deadline.[2] The agreement did not provide for a new Rule 227.4 deadline, nor did it specify the length of time of the extension.

¶ 9 On November 25, 2002, the parties appeared before the trial court. Attorneys Daniel J. Dugan and Jennifer Meyers appeared for both of the Defendants. Epstein was also present in the courtroom. During the hearing, the trial court specifically noted that because it appeared that additional briefing and discovery were necessary, an extension of the Rule 227.4 deadline would be necessary.

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[2] The agreement was signed by all parties between June 19-24, 2002.

N.T., 11/25/02, at 52.[3] During the on-the-record discussion, the following colloquy took place:

> THE COURT: There is an agreement to further extend Rule 227.4, Rule of Civil Procedure Deadline to the date of March 14th, 2003.
>
> During that period of time, there's some deadlines within deadlines, and this is what it is. [Thereafter the trial court outlined certain discovery and briefing deadlines.]
>
> * * *
>
> And [the] hearing will be on or before March the 14th. And we, of course, won't know what that will be until we get a bit closer. So we'll know what that date is. And we will contact each of you to find out what is convenient for you.
>
> And so March 14th ought to be the deadline for all of these.
>
> Do you have any problems with these dates?
>
> MR. DUGAN: *I don't have a problem with the date.*

Id. at 54-56 (emphasis added). Given the clear transcript of the proceedings, we conclude that it is disingenuous of the Defendants to now argue that they did not agree to extend the Rule 227.4 deadline to March 14, 2003.

¶ 10 Having concluded that the Defendants explicitly agreed on the record to extend the Rule 227.4 deadline until March 14, 2003, we must now determine whether

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[3] Although no such limitation was contained in the written agreement, the trial court believed that the Rule 227.4 extension expired on November 25, 2002.

that agreement violated Philadelphia Local Rule 227. Philadelphia Local Rule 227(e)(3) provides that "[t]he court shall dispose of the post-trial motions within 120 days of the filing of the first motion unless the parties agree in writing to waive the application of Pa.R.C.P. 227.4(1)(b)." In this case, the parties agreed in writing to extend the Rule 227.4 deadline. Therefore, the written agreement indefinitely extended the Rule 227.4 deadline. The Defendants' contention that the Rule 227.4 deadline would expire 120 days from the date of agreement is simply a bald assertion that is in no way supported by the agreement or Philadelphia Local Rule 227.[4] The agreement signed by all parties did not contain a specific date upon which the extension would expire.

¶ 11 Having concluded that the parties' written agreement to extend the Rule 227.4 deadline did not expire prior to the filing of the Praecipe to enter judgment, we conclude that the Defendants' actions in filing the praecipe violated their explicit agreement to extend the Rule 227.4 deadline. Accordingly, the judgment entered on January 9, 2003 was improvidently entered as a result of the Defendants' breach of their agreement to extend the Rule 227.4 deadline. As a result, Defendants' appeal of the trial court's December 30, 2002 contempt Order was interlocutory and not appealable at the time that the Defendants filed their appeals at 186 and 187 EDA 2003. Accordingly,

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[4] According to the Defendants' position, the extension of the Rule 227.4 deadline would have expired prior to the November 25, 2002 hearing. However, we note that the Defendants did not voice their position that the written agreement had expired during discussion concerning the Rule 227.4 deadline at that hearing.

the appeals filed at Nos. 186 and 187 EDA 2003 are quashed.[5]

¶ 12 In their joint appeal at 924 EDA 2003, the Defendants each raise numerous issues. SGR raises the following seven issues:

> 1. Whether the trial court erred in not holding and/or failing to instruct the jury that [Kanter] is legally barred from retaining the benefit of any referral fee inasmuch as the negotiation and/or receipt of such a fee would be an impermissible conflict of interest in light of [Kanter's] position as guardian of the minor child, as a result of having contributed to the settlement, and otherwise improper because it was not disclosed to the client or set forth in the retainer agreement.
>
> 2. [W]hether the trial court erred in awarding an *additur* inasmuch as there existed an evidentiary basis for the jury's calculation of compensatory damages.
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> 3. Whether the trial court erred, and deprived Defendants of their constitutional rights, in granting [Kanter's] Motion for a new trial on the claim for punitive damages, notwithstanding a jury verdict in favor of SGR and against Kanter on the claim for punitive damages, and in giving Kanter the option of a new trial, or an award of $645,000 in punitive damages without the necessity of a new jury trial on punitive damages.

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[5] We note that Kanter has expressly stated that her appeal at 1161 EDA 2003 would be withdrawn in the event that we granted her Motion to quash. Consequently, we will not address the issues raised by Kanter in her appeal.

4. Whether the trial court erred in ordering post-verdict asset discovery of Defendants where the jury found Defendants were not liable for punitive damages, no viable issue for a new trial on punitive damages was raised and no new trial as to punitive damages had been ordered.

5. Whether the trial court erred, and violated Defendants' constitutional rights, in holding SGR in contempt of court and imposing fines, without a hearing where (1) the order allegedly violated was not clear, definite and specific and/or (2) there was an absence of any evidence that Defendants violated the order, and/or (3) assuming *arguendo* a violation of an order of court, there was an absence of any evidence of a willful violation.

6. Whether the trial court erred, and violated Defendants' constitutional rights, in imposing attorney's fees as a sanction against SGR without a hearing and without any evidence presented as to entitlement of attorney's fees, the reasonableness of such fees or whether such fees were the result of conduct by SGR.

7. The Orders of January 10 and 15[,] 2003, and March 10, 2003, are void inasmuch as they were entered after the Court had been deprived of jurisdiction by reason of the appeals taken by Epstein and SGR on January 9, 2003.

Brief of SGR at 6. Epstein also raises the following issues:

1. Is a court-appointed Guardian for a seriously injured child, who (1) hires a lawyer and institutes a civil action in her capacity as Guardian on the child's behalf, (2) is subsequently joined as a defendant in that action based on her negligent

care of the child as the child's court-appointed Child Advocate, and (3) contributes to the monetary settlement of the child's case, precluded as a matter of law from requesting and receiving a percentage-based referral fee (that was oral, not confirmed in any writing and completely undisclosed to the minor or her newly appointed adoptive mother) because such an arrangement would constitute a clear conflict of interest between the Guardian's self-interest and that of her ward?

2. Is the judgment entered on the trial court's Order of March 10, 2003 improper, unconstitutional and unenforceable since: (a) the Order was entered two months after an appeal was taken with adequate security posted; (b) the trial court improperly awarded a substantial additur ($215,500) to the jury's assessment of compensatory damages, an assessment that was well supported by the record evidence; (c) the trial court ordered an improper, and unconstitutional award of punitive damages in the amount of $645,000 in favor of Kanter without a retrial on that issue notwithstanding the jury's proper rejection of Kanter's claim for punitive damages and the fact that the issue of punitive damages was improperly submitted to the jury in the first place; (d) the trial court improperly and unconstitutionally imposed fines for an alleged contempt of orders of the court for discovery and production of income-based documents of Epstein and his wife related to the issue of punitive [damages] during and after trial without legal or factual basis therefore and without providing the opportunity for Epstein to be heard; and (e) the trial court improperly and unconstitutionally awarded Kanter's unsupported and unwarranted request for sanctions in the form of substantial

attorney's fees pursuant to 42 Pa.C.S.A. § 2503, without legal or factual basis therefore and without providing the opportunity for Epstein to be heard?

3. Regarding Kanter's claims for breach of contract, did the trial court err in submitting the issue of breach of contract by Epstein to the jury, improperly refuse to enter judgment in favor of Epstein notwithstanding the verdict of the jury, or in the alternative, commit errors in the admission of evidence or instruction to the jury so as to require a new trial?

4. Regarding Kanter's claims of conversion, did the [trial] court err in submitting the issue of conversion by Epstein to the jury, improperly refuse to enter judgment in favor of Epstein notwithstanding the verdict of the jury or, in the alternative, commit errors in the admission of evidence or instruction to the jury so as to require a new trial?

Brief for Epstein at 4.

¶ 13 Prior to undertaking an analysis of the merits of the numerous issues raised by the Defendants, we must first determine whether the Defendants have properly preserved their issues for appellate review. In *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998),[6] the Pennsylvania Supreme Court specifically held that "from this date forward, in order to preserve their claims for appellate review, Appellants must comply whenever the trial court

[6] Since the Rules of Appellate Procedure apply to criminal and civil cases alike, the principles enunciated in criminal cases construing those rules are equally applicable in civil cases. *See McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 658 n. 2 (Pa.Super.2000).

orders them to file a Statement of Matters Complained of on Appeal pursuant to [Pennsylvania Rule of Appellate Procedure] 1925." *Lord,* 719 A.2d at 309. "Any issues not raised in a 1925(b) statement will be deemed waived." *Id.* This Court explained in *Riley v. Foley,* 783 A.2d 807, 813 (Pa.Super.2001), that Rule 1925 is a crucial component of the appellate process because it allows the trial court to identify and focus on those issues the parties plan to raise on appeal. This Court has further explained that "a Concise Statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent to no Concise Statement at all." *Commonwealth v. Dowling,* 778 A.2d 683, 686-87 (Pa.Super.2001). "Even if the trial court correctly guesses the issues Appellant[s] raise[ ] on appeal and writes an opinion pursuant to that supposition the issue[s][are] still waived." *Commonwealth v. Heggins,* 809 A.2d 908, 911 (Pa.Super.2002).

¶ 14 In this case, the trial court ordered the Defendants to file concise statements of the issues to be raised on appeal. However, the Rule 1925(b) Statements filed by the Defendants were anything but *concise.* SGR's fifteen-page Rule 1925(b) Statement included fifty-five issues that it purportedly sought to raise on appeal and also incorporated by reference the forty-nine issues raised by Epstein in his Rule 1925(b) Statement. Likewise, Epstein filed a fifteen-page Rule 1925(b) Statement that raised the forty-nine issues, and also incorporated by reference the fifty-five issues raised by SGR.[7] In total, the Defendants identified

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[7] As we have done before in such a case, we draw counsel's attention to the following quote:

> With a decade and a half of federal appellate court experience behind me, I can say that even when we reverse a trial

(Continued on following page)

104 issues in their Rule 1925(b) Statements. Furthermore, we note that many of the issues identified by each of the Defendants also included multiple sub-issues.

¶ 15 The Defendants' failure to set forth the issues that they sought to raise on appeal in a *concise* manner impeded the trial court's ability to prepare an opinion addressing the issues that the Defendants sought to raise before this Court, thereby frustrating this Court's ability to engage in a meaningful and effective appellate review process. *See Commonwealth v. Steadley,* 748 A.2d 707, 709 (Pa.Super.2000); *see also Commonwealth v. Kimble,* 756 A.2d 78, 80 (Pa.Super.2000). By raising an outrageous number of issues, the Defendants have deliberately circumvented the meaning and purpose of Rule 1925(b) and have thereby effectively precluded appellate review of the issues they now seek to raise.

¶ 16 In this case, the Defendants' voluminous Rule 1925(b) Statements did not identify the issues that the Defendants *actually intended* to raise before the Superior

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court it is rare that a brief successfully demonstrates that the trial court committed more than one or two reversible errors. . . . [W]hen I read an appellant's brief that contains ten or twelve points, a presumption arises that there is no merit to any of them. I do not say that this is an irrebuttable presumption, but it is a presumption nevertheless that reduces the effectiveness of appellate advocacy. Appellate advocacy is measured by effectiveness, not loquaciousness. Aldisert, The Appellate Bar: Professional Competence and Professional Responsibility – A View from the Jaundiced Eye of One Appellate Judge, 11 Cap.U.L.Rev. 445, 458 (1982).

Estate of Lakatosh, 656 A.2d 1378, 1380 n. 1 (Pa.Super.1995) (*quoting United States v. Hart,* 693 F.2d 286, 287 n. 1 (3d Cir.1982)).

Court. The Defendants' Rule 1925(b) Statements identify significantly more issues than the Defendants could possibly raise on appeal due to the appellate briefing limitations requiring that the Statement of the question involved not exceed fifteen lines, and in any event, one page. *See* Pa.R.A.P. 2116(a). In this case, the trial court was presented with fifty or more issues that each defendant identified for appeal. This forced the trial court to guess which issue the Defendants would actually raise on appeal. This Court has previously explained that "[w]hen a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Commonwealth v. McCree*, 857 A.2d 188, 192 (Pa.Super.2004).

¶ 17 Furthermore, we note that despite the fact that the trial court authored an eighty-five page Opinion, the trial court was, through no fault of its own, unable to provide a comprehensive analysis of the issues it did address due to the preposterous number of issues identified by the Defendants. This too has impeded our ability to undertake a meaningful review of the issues raised by the Defendants on appeal. Accordingly, we must conclude that the Defendants have failed to preserve any of their issues for appellate review.

¶ 18 We further conclude that the Defendants engaged in misconduct when they attempted to overwhelm the trial court by filing Rule 1925(b) Statements that contained a multitude of issues that the Defendants did not intend to raise and/or could not raise before this Court. The trial court expressed its frustration concerning the Defendants' misconduct in its Opinion:

> *The Defendants breached their duty of fair dealing with this Court* when they: . . . entered snap judgments after agreeing in open court [and in

> writing] to an extension of Rule 227.4; . . . and when they filed 1925(b) Statements that raised substantially more issues than they will be permitted to address on appeal because of the limitations set forth in Pa.R.A.P. 2135.

Trial Court Opinion, 2/26/04, at 84-85 (emphasis in original, footnote omitted). We agree with the trial court that the Defendants' conduct breached their duty of good faith and fair dealing with the court. The Defendants have pursued a course of conduct designed to undermine the Rules of Appellate Procedure. In addition to those issues which we have previously addressed, we note that the Defendants' appellate briefs blatantly violate the Pennsylvania Rules of Appellate Procedure. Both of the Defendants have violated Pennsylvania Rule of Appellate Procedure 2116(a), which provides in pertinent part:

> (a) General rule. The statement of the questions involved must state the question or questions in the briefest and most general terms, without names, dates, amounts or particulars of any kind. It should not ordinarily exceed 15 lines, must never exceed one page, and must always be on a separate page, without any other matter appearing thereon. *This rule is to be considered in the highest degree mandatory, admitting of no exception; ordinarily no point will be considered which is not set forth in the statement of questions involved or suggested thereby.*

Pa.R.A.P. 2116(a) (emphasis added). The Defendants' Statements of questions involved do not identify the issues in the briefest and most general terms. Furthermore, both of the Defendants' Statements of issues also exceed 15 lines. We note that the Defendants were only able to contain their Statements of the question on one page

through the use of single spacing, decreased font size, and altered margins. The Defendants disregarded Rule 2116(a) despite the fact that the Rule plainly states that it "is to be considered in the highest degree mandatory."

¶ 19 Moreover, Epstein violated Rule 2119 of the Pennsylvania Rules of Appellate Procedure. Rule 2119 provides in pertinent part:

> (a) General rule. The argument shall be divided into as many parts as there are questions to be argued; and shall have at the head of each part – in distinctive type or in type distinctively displayed – the particular point treated therein, followed by such discussion and citation of authorities as are deemed pertinent.

Pa.R.A.P. 2119(a) (emphasis added). The argument portion of Epstein's brief is not divided into parts that correspond with his questions to be argued. Furthermore, the sections of Epstein's argument are not presented in the same order as the issues raised in his Statement of questions.

¶ 20 We can only conclude that the motive underlying such conduct is to overwhelm the court system to such an extent that the courts are forced to throw up their proverbial hands in frustration. While such tactics may prove successful in other situations, we are unwilling to succumb to such chicanery and will not reward such misconduct.

¶ 21 Appeals at 186 and 187 EDA 2003 quashed; appeal at 1161 EDA 2003 withdrawn; judgment No. 924 EDA 2003 affirmed.

NANCY KANTER, ESQUIRE	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ALAN B. EPSTEIN, ESQUIRE AND SPECTOR, GADON & ROSEN	:	
APPEAL OF: SEPCTOR [sic], GADON & ROSEN	:	No. 186 EDA 2003
NANCY KANTER, ESQUIRE	:	
v.	:	
ALAN B. EPSTEIN, ESQUIRE AND SPECTOR, GADON & ROSEN	:	
APPEAL OF: ALAN B. EPSTEIN, ESQUIRE	:	No. 187 EDA 2003
NANCY KANTER, ESQUIRE	:	
v.	:	
ALAN B. EPSTEIN, ESQUIRE AND SPECTOR, GADON & ROSEN, P.C.	:	
APPEAL OF: SEPCTOR [sic], GADON & ROSEN AND ALAN B. EPSTEIN, ESQUIRE	:	No. 924 EDA 2003
NANCY KANTER, ESQUIRE	:	
v.	:	
ALAN B. EPSTEIN, ESQUIRE AND SPECTOR, GADON & ROSEN	:	
APPEAL OF: NANCY KANTER, ESQUIRE	:	No. 1161 EDA 2003

ORDER

AND NOW, this 11th day of February, 2005, IT IS HEREBY ORDERED:

THAT the applications filed December 23, 2004, requesting reargument/reconsideration of the decision dated December 10, 2004, are DENIED.

PER CURIAM

Kanter v. Epstein

no. 0758

COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA

66 Pa. D. & C.4th 353; 2004 Pa. D. & C. LEXIS 36

February 26, 2004, Decided

COUNSEL: George Bochetto, for plaintiff.

Daniel J. Dugan and Alan B. Epstein, for defendants.

JUDGES: PAPALINI, J.

OPINION BY: PAPALINI

OPINION:

The plaintiff and both defendants have filed appeals with respect to this case. This opinion will address the contentions raised in all the pending appeals. The history of this case, especially after verdict, is complex.

I. FACTUAL HISTORY

(1) On January 25, 2001, plaintiff, Nancy Kanter, Esquire, filed suit against the defendants, Alan B. Epstein, Esquire, and the firm with which he is associated, Spector Gadon & Rosen P.C. (SGR), claiming that she was deprived of a referral fee of $431,000. The complaint included counts of anticipatory breach of contract and conversion and demanded both compensatory and punitive damages.

(2) The matter was tried by a jury with the undersigned presiding. Plaintiff was represented by George Bochetto, Esquire, and the defendants were represented

by Daniel J. Dugan, Esquire, and Alan B. Epstein, Esquire. On May 8, 2002, the jury returned with a verdict in favor of plaintiff against both defendants in the amount of $215,000, compensatory damages. In answer to interrogatories, the jury found that defendants had both breached a contract with plaintiff and that they had committed a conversion of the funds due plaintiff.

(3) On the basis of the jury finding that a conversion had occurred, we directed defendants to supply plaintiff with financial information so plaintiff could proceed with the punitive damages phase of the trial. Defendants failed to comply. On May 13, 2002, the jury did not award punitive damages.

(4) On May 14, 2002, plaintiff filed a motion for section 2503 sanctions (motion no. 050803). On May 17, 2002, plaintiff filed post-trial motions. On May 23, 2002, defendants filed a motion for post-trial relief and a request for a court en banc. For purposes of Pa.R.C.P. 227.4(b), the date by which we had to decide the motions was September 16, 2002. A briefing schedule was set, with oral argument originally scheduled for August 22, 2002.

(5) Because of a delay in the transcription of the notes of testimony, defendant SGR requested an extension of the briefing dates and oral argument. Between June 19, and June 24, 2002, all *parties agreed* in writing to the extension request and *a concomitant extension of Rule 227.4*.

(6) On September 17, 2002, we issued a rule to show cause on defendants why they should not be held in civil contempt for failure to prepare and produce at the punitive damages stage of the trial, financial records as directed by the court, citing N.T. 753-57, 5/1/02; N.T. 1448-52, 5/6/02;

N.T. 1498-1500, 5/8/02; N.T. 3-7, 16-31, 5/9/02); and why defendants should not be liable for reasonable counsel fees pursuant to 42 Pa.C.S. § 2503.

(7) The rule was returnable November 25, 2002. Briefs were due and received from all parties prior to that date.

(8) Oral argument was held on November 25, 2002. Plaintiff was represented by Mr. Bochetto. Both defendants were represented by Mr. Dugan. In addition to substantive legal arguments, there were also discussions both off and then on the record regarding the procedure to be followed in resolving the issues presented to the court. The court agreed with plaintiff that discovery regarding defendants' finances was necessary. *It was agreed on the record that:*

(a) Rule 227.4 was extended to March 14, 2003.

(b) By December 9, 2002, both plaintiff and defendants would submit lists of documents they want in discovery. All challenges to the lists had to be submitted by December 26, 2002.

(c) Between November 25, 2002 and December 26, 2002, both sides could file additional briefs, and Mr. Bochetto was required to submit a list of specific counsel fees that he was demanding.

(d) After December 26, 2002, the court would issue an order regarding the scope of discovery, including both documents and depositions.

(e) All discovery was to be completed by January 31, 2003.

(f) By February 18, 2003, both sides would submit discovery and additional memoranda.

(g) If deemed necessary by the court, a hearing on both sanctions and contempt would be scheduled for a date after February 18, 2003, but before March 14, 2003.

(9) Thereafter, both sides submitted their discovery lists, challenges to same and briefs.

(10) On December 30, 2002, we issued an order, with the following provisions:[1]

(a) Defendant Epstein shall comply with the plaintiff's combined interrogatories and document requests, as per plaintiff's filing dated December 9, 2002;

(b) Defendant Spector Gadon & Rosen P.C. shall comply with the plaintiff's combined interrogatories and document requests, as per plaintiff's filing dated December 9, 2002;

(c) Defendant Epstein shall appear for deposition;

(d) Steven Gadon, Esquire, shall appear for deposition;

(e) Defendant Epstein shall supply to plaintiff the full name and service of process address for Mrs. Epstein (unless defendant Epstein consents to accept service of her subpoena);

(f) Mrs. Epstein shall thereafter honor the subpoena, as per plaintiff's filing dated December 9, 2002;

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[1] The order was immediately served on all parties but was not docketed until January 9, 2003.

(g) Defendant Epstein shall supply to plaintiff the full name and service of process address of the accountant for Mr. and Mrs. Epstein;

(h) Plaintiff may then serve the Epstein accountant with the subpoena, as per plaintiff's filing dated December 9, 2002, and said accountant shall honor said subpoena;

(i) Defendant Spector Gadon & Rosen P.C. shall supply to plaintiff the full name and service of process address of its accountant;

(j) Plaintiff may then serve said Spector Gadon & Rosen P.C. accountant with the subpoena, as per plaintiff's filing dated December 9, 2002, and said accountant shall honor said subpoena;

(k) All parties shall cooperate in the scheduling of discovery and depositions so that all discovery and depositions are completed by January 31, 2003, as per the schedule established by the court and all parties on November 25, 2002.

(11) On January 8, 2003, defendants filed with the prothonotary of the court of common pleas a praecipe to enter judgment. On January 9, defendants filed notices of appeal (SGR: 186 EDA 2002; Epstein: 187 EDA 2003). *This was done despite the on-the-record agreement reached on November 25, 2002, to extend Rule 227.4* to March 14, 2003.

(12) On January 10, 2003, the court issued an order intended to reassert and modify the order of December 30, 2002, with which defendants had failed to comply. The provisions were as follows:

(a) By 5 p.m., January 15, 2003, defendant Epstein shall provide Mrs. Epstein's full name and service address or written statement accepting full service of subpoena for her;

(b) By 5 p.m., January 15, 2003, defendant Epstein shall provide the name and service address of accountant(s) for the years 1997 to 2001;

(c) By 5 p.m., January 15, 2003, defendant SGR shall provide the name and service address of accountant(s) for the years 1997 to 2001;

(d) By 5 p.m., January 17, 2003, defendant Epstein and defendant SGR shall deliver all documents contained in plaintiff's combined interrogatories and document request of December 9, 2002;

(e) Mrs. Epstein shall be deposed at 9:30 a.m. on January 20, 2003, in plaintiff's counsel's office;

(f) The deposition of Epstein accountants shall be at 1 p.m. on January 20, 2003;

(g) Steven Gadon shall be deposed at 9:30 a.m. on January 21, 2003;

(h) SGR accountants shall be deposed at 1 p.m. on January 21, 2003;

(i) Defendant Epstein's deposition shall be at 9:30 a.m. on January 23, 2003.

(13) Defendants again failed to comply with the court's order of January 10, 2003. Therefore, on January 15, 2003, we issued the following order:

"Defendant Alan B. Epstein, Esquire, and defendant Spector Gadon & Rosen P.C. *shall*

> comply with this court's discovery order of January 10, 2003. Failure to comply will result in the imposition of a fine of $500 for each day of noncompliance by defendant Alan B. Epstein, Esquire, and a fine of $1,000 for each day of noncompliance by defendant Spector Gadon & Rosen P.C."

(14) On January 15, 2003, plaintiff filed a motion for contempt of contempt proceedings against defendants for the failure to comply with the court's order of January 10, 2003. (Motion no. 011174.)

(15) On January 16, 2003, defendant Epstein filed an appeal from our order of January 10, 2003 (301 EDA 2003), and our order of January 15, 2003 (302 EDA 2003). On January 16, 2003, defendant SGR filed an appeal from our order of January 10, 2003 (300 EDA 2003), and our order of January 15, 2003 (299 EDA 2003).

(16) On January 16, 2003, defendants filed with the Superior Court a "Petition for the issuance of a writ of prohibition restraining the Honorable Joseph I. Papa. ii from exceeding jurisdiction of his court and petition for expedited consideration." That petition was assigned to the Honorable Robert Graci.

(17) On January 22, 2003, we wrote to the prothonotary of the Superior Court, with a copy of the letter faxed to Judge Graci, requesting that the defendants' appeals be quashed as premature.

(18) On January 22, 2003, *Judge Graci issued an order denying defendants' petition for the issuance of a writ of prohibition.*

(19) On January 24, 2003, plaintiff filed with the Superior Court a motion to quash defendants' appeals.

(20) On January 29, 2003, plaintiff presented to this court a post-trial objection to security pursuant to Pa. R.A.P. 1737, but that was resolved as of March 7, 2003, when defendants posted alternate security.

(21) On February 13, 2003, Gabriel L.I. Bevilaqua, Esquire, and William Matthews, Esquire, entered their appearance on behalf of both defendants.

(22) On February 3, 2003, plaintiff filed a notice of appeal from the defendants' entry of judgment. (1161 EDA 2003.)

(23) On February 4, 2003, defendants filed a motion for clarification, reconsideration or, in the alternative, stay [of the court's orders of December 30, 2002, January 10, 2003 and January 15, 2003, pending the resolution of defendants' appeals]. (Motion no. 022428.)

(24) A conference was held on March 6, 2003.

(25) On March 7, 2003, we denied the defendants' motion for clarification, reconsideration or, in the alternative, stay. (Motion no. 022428.)

(26) On March 10, 2003, we issued the following order resolving all outstanding post-trial motions including motion no. 050803 and motion no. 011174:

> "After consideration of plaintiff's post-trial motions, including a prayer that the defendants be held in civil contempt; plaintiff's motion for section 2503 sanctions; plaintiff's motion for contempt of contempt proceedings because of defendants' failure to comply with our order of

January 10, 2003, and our order of January 15, 2003; defendants' motion for post-trial relief; and plaintiff's undocketed post-trial objection to security pursuant to Pa.R.A.P. 1737,

"It is hereby ordered and decreed that:

"(1) Defendants' motion for post-trial relief is denied;

"(2) Plaintiff's post-trial motions are denied in part and granted in part:

"(a) Plaintiff's request for an additur to the jury's award of compensatory damages is granted, and the award of compensatory damages is increased by $215,500 to $431,000;

"(b) Plaintiff's request for pre-judgment interest is granted; pre-judgment interest at the rate of 6 percent from March 3, 2001, totaling $30,429 is added to the award of $431,000, for a total award of $461,429;

"(c) Plaintiff's request for post-judgment interest is granted and shall be awarded from the date of judgment;

"(d) Plaintiff's request that defendants be judicially estopped from contesting the jury's award of compensatory damages is denied;

"(e) As to punitive damages, the court has concluded that plaintiff is entitled to relief; plaintiff may elect within 30 days to accept either of the following remedies:

"(i) A new trial on punitive damages only; or

"(ii) The sum of $645,000[2] payable by defendants to plaintiff in full satisfaction of plaintiff's claim for punitive damages;

"(3) Plaintiff's motion for section 2503 sanctions is granted: The court orders defendants to pay plaintiff the sum of $124,219.86 in attorney's fees pursuant to 42 Pa.C.S. § 2503;

"(4) Plaintiff's additional requests for contempt citations against defendants are granted: defendants shall pay to the court of common pleas the sum of $7,500 as a penalty for their contemptuous conduct relating to the punitive damage phase of the trial;

"(5) The court finds that defendant Alan B. Epstein, Esquire, is in contempt of our order of January 15, 2003, and orders said defendant to pay plaintiff the accrued fines in the amount of $26,500;

"(6) The court finds that defendant Spector Gadon & Rosen P.C. is in contempt of our order of January 15, 2003, and orders said defendant to pay plaintiff the accrued fines in the amount of $53,000;

"(7) The order of this court dated January 15, 2003, continues in full force and effect, including the accruement of fines set forth therein until our discovery order is complied with;

"(8) Plaintiff's undocketed post-trial objection to security pursuant to Pa.R.A.P. 1737 is dismissed as moot."

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[2] We calculated punitive damages as approximately three times the compensatory damages awarded by the jury.

(27) On March 12, 2003, plaintiff filed a praecipe to enter judgment pursuant to the court's order of March 10, 2003, and elected to take the sum of $645,000 as punitive damages rather than have a new trial on punitive damages.

(28) On March 12, 2003, both defendants filed a notice of appeal of our order of March 10, 2003. (924 EDA 2003.)

(29) On March 13, 2003, defendants filed with this court an emergency motion for stay from court's March 10, 2003 order pending appeal. (Motion no. 031332.)

(30) A conference with counsel was held on March 17, 2003.

(31) On March 21, 2003, Richard A. Sprague, Esquire, entered his appearance on behalf of defendant SGR.

(32) On March 25, 2003, the Superior Court quashed defendants' appeals from our order of January 10, 2003. (300 EDA 2003 and 301 EDA 2003.)

(33) On March 26, 2003, the Superior Court quashed defendants' appeals from our order of January 15, 2003. (299 EDA 2003 and 302 EDA 2003.)

(34) On March 25, 2003, the Superior Court denied plaintiff's motion to quash defendants' original appeals [of our order of December 10, 2002, and judgment on the verdict entered January 8, 2003] "without prejudice to plaintiff's right to raise this issue at the time scheduled for submission or argument of this matter before a panel that will decide the merits of this appeal." (186 EDA 2003 and 187 EDA 2003.)

(35) On March 28, 2003, defendant SGR filed a motion to vacate court's orders of January 10, 2003, January 15, 2003 and March 10, 2003. (Motion no. 032798.) On March 28, 2003, defendant Epstein filed a motion to vacate and/or reconsider court's orders of January 10, 2003, January 15, 2003 and March 10, 2003. (Motion no. 032847.)

(36) On April 11, 2002, we issued an order disposing of motions no. 031332, no. 032798 and no. 032847:

"(1) Defendant Spector Gadon & Rosen P.C.'s motion to vacate this court's orders of January 10, 2003, January 15, 2003 and March 10, 2003 (no. 032798), is denied;

"(2) Defendant Alan B. Epstein, Esquire's motion to vacate this court's orders of January 10, 2003, January 15, 2003 and March 10, 2003 (no. 032847), is denied;

"(3) Both defendants' emergency motion for stay from court's March 10, 2003 order pending appeal (no. 031332), is granted in part:

"(a) The accrual of fines, referred to in paragraph 7 of our order of March 10, 2003, is suspended as of March 12, 2003;<1>

"(b) Pursuant to Pa.R.A.P. 1732(a) and 1733(a), the *total* security required to be filed by defendants to operate as a supersedeas, shall be in the amount of $1,106,429.<2>

"1. This is the date plaintiff filed an election with respect to punitive damages, eliminating the need for further discovery.

"2. The security is required for the following damages:

Jury verdict:	$215,500
Additur:	215,500
Pre-judgment interest:	30,429
Punitive damages:	645,000
	$1,106,429"

(37) On April 22, 2003, the Superior Court issued a stay pending disposition of appellants' emergency motions. (186, 187, 924 EDA 2003.)

(38) On May 5, 2003, appellants' emergency motion for a stay was denied. (186, 187, 924 EDA 2003.)

(39) On May 8, 2003, we ordered plaintiff and both defendants to file a statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b), by June 9, 2003. Those statements were filed.

(40) On May 28, 2003, the Pennsylvania Supreme Court ordered that the prior security filed by defendants on appeals 186 and 187 EDA 2003 in the amount of $258,000 shall act as a supersedeas as it relates to appeal 924 EDA 2003.

II. ISSUES

A. *The Following Issue Was Raised by Plaintiff Kanter in Her 1925(b)* Statement

(1) Whether plaintiff should be granted additur of $216,000 on the jury's compensatory damages verdict where: (i) the jury heard: (A) this uncontested fact – plaintiff lawyer referred her minor client's personal injury

case to defendant lawyer; (B) this contested fact – plaintiff so referred in exchange for promised receipt of a referral fee; (C) this uncontested fact – the referral fee was valued at one-third of the attorney's fees that would be awarded in referred client's case; (D) these contested facts – after the referral fee agreement was struck, defendant lawyer merged his practice into defendant law firm and/or law firm otherwise assumed or co-assumed liability for paying referral fee; (E) this uncontested fact – the attorney's fees awarded in referred client's case amounted to $1,293,000 (net of costs); (ii) the jury returned a breach of contract and conversion verdict in favor of plaintiff and against defendants; (iii) the jury awarded plaintiff $215,000 thereon (that is, $216,000 less than one-third of $1,293,000).

Ms. Kanter preserved this matter for appellate review, including during trial on May 13, 2002. May 13, 2002 trial tr., 5-6, 14-17.

(2) Whether plaintiff/breach of contract verdict-winner should be awarded pre-judgment interest from the date defendants breached that contract and, if so, whether that interest should accrue upon the amount added to the compensatory damages verdict in the event additur is granted.

Ms. Kanter preserved this matter for appellate review, including pretrial, in her complaint. Complaint, 7 (Count I Wherefore clause); 9 (Count II Wherefore clause).

(3) Whether plaintiff/breach of contract and conversion verdict-winner should be awarded post-judgment interest from the date judgment thereon is entered and, if so, whether that interest should accrue upon the amount

added to the compensatory damages verdict in the event additur is granted.

Ms. Kanter preserved this matter for appellate review, including pretrial, in her complaint. Complaint, 7 (Count I Wherefore clause); 9 (Count II Wherefore clause).

(4) Whether, by his and/or their trial misconduct, a lawyer-defendant proceeding pro se, and the trial lawyer for his co-defendant employer law firm, may so derail, corrupt, improperly influence, and/or otherwise render unfair the punitive damages phase of a bifurcated trial that a new trial may be awarded as to the punitive damages phase alone, or the trial court may award punitive damages.

Ms. Kanter preserved this matter for appellate review, including during trial on April 30 and May 9, 2002. April 30, 2002 trial tr., 234-81; May 9, 2002 trial tr., 3-4, 16-30, 106-109, 131-33.

(5) Whether – as to a particular issue(s) – defendant may waive entitlement to file a post-trial motion and/or take an appeal from a verdict owing to evidence he elicits and/or arguments he makes to the jury.

Ms. Kanter preserved this matter for appellate review, including during trial on May 13, 2002. May 13, 2002 trial tr., 7-8.

B. *The Following Issues Were Raised by Defendant Epstein in His 1925(b)* Statements

(1) The trial court erred in its March 10, 2003 order in setting aside the jury's finding that defendants were not liable for punitive damages and granting to plaintiff the

option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000 (three times the amount of compensatory damages awarded by the jury) without the necessity of a new trial, where plaintiff's only claim of error with respect to the jury's finding for defendants on the issue of liability for punitive damages was that defendants failed and/or refused to produce financial information ordered by the court, which is a claim that is relevant only to the amount of punitive damages and not defendants' liability therefore, and where use of evidence of a defendant's net worth cannot establish liability for punitive damages. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(2) The trial court erred in ordering post-verdict asset discovery of defendants where the jury found that defendants were not liable for punitive damages, and where no new trial had been granted. This issue was first presented in the trial court's order of December 30, 2002. *See also*, N.T. 11/25/02, pp. 47-48.

(3) The trial court's March 10, 2003 order setting aside the jury's finding that defendants were not liable for punitive damages and granting to plaintiff the option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000, as to which

plaintiff opted for an award of punitive damages in the amount of $645,000 without the necessity of a new trial, deprived defendants of their right to a jury trial on the issue of punitive damages guaranteed under the constitutions of the United States and this Commonwealth. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(4) The trial court's March 10, 2003 order setting aside the jury's finding that defendants were not liable for punitive damages and granting to plaintiff the option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000, as to which plaintiff opted for an award of punitive damages in the amount of $645,000, without the necessity of a new trial, deprived defendants of their right to due process of law. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(5) The trial court erred in setting aside the jury's finding that defendants were not liable for punitive damages and granting plaintiff a new trial on her claim for punitive damages. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(6) The trial court erred in setting aside the jury's finding on compensatory damages and in ordering an additur with respect to the award of compensatory damages to plaintiff. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 2-6. *See also*, N.T. 11/25/02, pp. 41-43, 46.

(7) The trial court erred in setting aside the jury's finding on compensatory damages and ordering an additur with respect to the award of compensatory damages to plaintiff where the evidence produced provided an alternative basis for calculating a damage award based on hourly billings by plaintiff. Mr. Epstein preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 2-6. *See also*, N.T. 11/25/02, pp. 41-43, 46.

(8) The trial court erred in awarding pre-judgment interest where the claim for compensatory damages was not a claim for a readily ascertainable sum. Mr. Epstein preserved this issue in defendants' reply brief in opposition

to plaintiff's post-trial motion and memorandum of law at 6-8. *See also*, N.T. 11/25/02, pp. 40-42.

(9) The trial court committed reversible error in its order of March 10, 2003, by granting plaintiff's requests for post-judgment interest because the verdict was against the weight of the evidence and plaintiff failed to establish her claims for conversion and breach of contract at the trial as a matter of law. Mr. Epstein preserved this issue before the trial court by arguing contra to plaintiff's requests for pre-judgment interest in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 6-8 and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 11/25/02, pp. 48, 50.

(10) The trial court committed reversible error in its order of March 10, 2003, by granting plaintiff's requests for citations for contempt and directing defendants to pay the court $7,500, and directing defendant Mr. Epstein to pay the plaintiff $26,500, and defendant Spector Gadon & Rosen P.C. to pay plaintiff $53,000 without a formal motion for contempt, without a hearing, and in the absence of any evidence that Mr. Epstein could have produced more information at trial than he did concerning his personal net worth. Mr. Epstein preserved this issue before the trial court by arguing contra to plaintiff's requests for citations for contempt in his opposition to plaintiff's motions for contempt and for attorneys' fees under 42 Pa.C.S. § 2503 and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 5/9/02, pp. 29-30, 107, 178; *See also*, N.T. 11/25/02, pp. 5-8, 15-16, 19-23, 31-33, 46-48, 57.

(11) The trial court committed reversible error in its orders of December 30, 2002 and January 10, 2003, by granting plaintiff's requests for sensitive post-verdict asset discovery of, inter alia, defendants, Mr. Epstein's wife and Mr. Epstein's accountant. Mr. Epstein preserved this issue before the trial court by arguing contra to plaintiff's requests for discovery throughout defendants' [] opposition to post-trial discovery proposed by plaintiff and plaintiff's supplemental memorandum of law regarding the relevancy of Epstein's entireties property and by raising this issue at oral argument on the post-trial motions before the trial court, *see* (N.T. November 25, 2003, pp. 5-8, 15-16, 19-23, 46-48, 57-59), and by appealing the trial court's December 30, 2002 order to the Superior Court of Pennsylvania on January 9, 2003.

(12) The trial court committed reversible error in its order of March 10, 2003, by finding Mr. Epstein in contempt for failing to comply with the court's January 15, 2003 order. Mr. Epstein preserved this issue before the trial court by arguing contra to plaintiff's requests for discovery pursuant to plaintiff's requests for citations for contempt throughout defendants' opposition to post-trial discovery proposed by plaintiff and plaintiff's supplemental memorandum of law regarding the relevancy of Epstein's entireties property and by raising this issue at oral argument on the post-trial motions before the trial court, *see* (N.T. November 25, 2003, pp. 4-8, 15-16, 19-22, 56-61), and by appealing the trial court's December 30, 2002 order to the Superior Court of Pennsylvania on January 9, 2003.

(13) The trial court erred in finding defendant Mr. Epstein in contempt of court. Mr. Epstein preserved this issue throughout defendants' answer to the rule to show cause and supporting memorandum and further addressed

this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(14) The trial court erred in finding defendant Mr. Epstein in contempt of court where Mr. Epstein did not violate any clear order of the trial court, and brought in the only document he had relevant to his individual net worth. *See* N.T. 11/25/02, pp. 5-8, 15-16; *See also*, N.T. 5/9/02, pp. 29-30, 107, 178.

(15) The trial court erred in allowing plaintiff to pursue the net worth of defendants without having sought discovery of such information or obtaining an order pursuant to *Rule 4003.7 of the Pennsylvania Rules of Civil Procedure* prior to trial. *See* N.T. 4/30/02, pp. 235-81; *See also*, N.T. 11/25/02, p. 7.

(16) The trial court erred in finding defendant Mr. Epstein in contempt of court, and in imposing fines, without a hearing. Mr. Epstein preserved these issues throughout defendants' answer to the rule to show cause and supporting memorandum and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(17) The trial court denied Mr. Epstein his constitutional right to due process of law guaranteed under the constitutions of the United States and/or this Commonwealth in finding Mr. Epstein in contempt of court and in imposing fines against Mr. Epstein without a hearing. These issues were first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Mr. Epstein preserved this issue throughout defendants' answer to the

rule to show cause and supporting memorandum and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(18) The trial court erred in imposing attorneys' fees as a sanction against defendant Mr. Epstein, and in doing so without a hearing on either plaintiff's entitlement to attorneys' fees, the reasonableness of such fees, and whether such fees were caused by Mr. Epstein. Mr. Epstein preserved these issues in defendants' answer to the rule to show cause and supporting memorandum at 12-22, in defendants' memorandum of law in opposition to plaintiff's motion for 42 Pa.C.S. § 2503 sanctions and supporting memorandum of law at 11, and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 26-28, 32-33, 56-61.

(19) The trial court denied Mr. Epstein his constitutional right to due process of law guaranteed under the constitutions of the United States and/or this Commonwealth in imposing attorneys' fees as a sanction against defendant Mr. Epstein without a hearing. Mr. Epstein preserved these issues in defendants' answer to the rule to show cause and supporting memorandum at 12-22 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(20) The trial court erred in issuing its January 10, 2003, January 15, 2003, and March 10, 2003 orders when an automatic supersedeas was in effect pursuant to Pa.R.A.P. 1701 et seq. Mr. Epstein preserved this issue in

his motion to vacate and/or reconsider filed March 28, 2003.

(21) The trial court erred in issuing its January 10, 2003, January 15, 2003, and March 10, 2003 orders on the later-unrealized belief that defendants' appeals filed January 9, 2003, would be quashed.

(22) The jury's verdict that Alan B. Epstein, Esquire, individually entered into an agreement for the payment of a referral fee to Nancy Kanter was contrary to the law of the Commonwealth of Pennsylvania, and against the weight of the evidence. Mr. Epstein preserved these issues in defendants' motion for post-trial relief at PP1-2. *See also*, N.T. 11/25/02, pp. 48-50.

(23) The jury's verdict that Mr. Epstein was liable for the payment of a referral fee to plaintiff was contrary to the law of the Commonwealth of Pennsylvania, and against the weight of the evidence. These issues were preserved in defendants' motion for post-trial relief at PP3-4, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 31-34. *See also*, N.T. 11/25/02, pp. 48-50.

(24) The evidence presented at trial was insufficient as a matter of law to establish that Mr. Epstein entered into an agreement for the payment of a referral fee to plaintiff, or breached such an agreement. Mr. Epstein preserved these issues in argument on motion for directed verdict, N.T. 5/2/02, pp. 890-91, defendants' motion for post-trial relief at PP5-6, and defendants' memorandum of law in support of their motion for post-trial relief at 31-34, 48-50. *See also*, N.T. 11/25/02, pp. 48-50.

(25) The jury's verdict with respect to the amount of damages suffered by plaintiff Nancy Kanter was against the weight of the evidence. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P7.

(26) Any agreement for the payment of a referral fee made between plaintiff and Mr. Epstein individually was unenforceable as a matter of law because plaintiff as guardian ad litem and guardian of the estate of Tara M., as a matter of law, could not contract for or receive a referral fee from the proceeds paid to the estate of Tara M. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P9, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52, and in motion in limine of defendants to preclude certain evidence, which the court denied. *See* N.T. 4/29/02, p. 3; *See also*, N.T. 11/25/02, pp. 48-50.

(27) Any agreement for the payment of a referral fee made between plaintiff and Mr. Epstein individually was unenforceable as a matter of law because Mr. Epstein lacked the legal capacity to enter into any such agreement. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P10, and in motion in limine of defendants to preclude certain evidence, which the court denied. *See* N.T. 4/29/02, p. 3.

(28) Plaintiff was precluded as a matter of law from asserting a claim for a referral fee against Mr. Epstein as an officer or stockholder of Jablon, Epstein, Wolf & Drucker P.C. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P11, and in motion in limine of defendants to preclude certain evidence, which the court denied. *See* N.T. 4/29/02, p. 3.

(29) The trial court erred in permitting plaintiff to present the expert testimony of James Schwartzman, Esquire, because that testimony (a) went to a legal issue only, on which the trial court had previously ruled, (b) was irrelevant to the issues to be resolved by the jury, and (c) any relevance the testimony might have had was outweighed by its prejudicial effect on defendants. Mr. Epstein preserved this issue in motion in limine of defendants to preclude certain evidence, pp. 34-36; N.T. 4/29/02, pp. 4-20; N.T. 5/1/02, pp. 610-13; defendants' motion for post-trial relief at P14, and defendants' memorandum of law in support of their motion for post-trial relief at 57-64. *See also*, N.T. 11/25/02, p. 49.

(30) The jury's verdict that Mr. Epstein converted the property of plaintiff was contrary to the law of the Commonwealth of Pennsylvania, and was against the weight of the evidence. Mr. Epstein preserved these issues in defendants' motion for post-trial relief at PP15-16, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52, 54-56. *See also*, N.T. 11/25/02, pp. 48-50.

(31) The evidence presented at trial was insufficient as a matter of law to establish that Mr. Epstein converted the property of plaintiff. Mr. Epstein preserved this issue in argument on motion for directed verdict, N.T. 5/2/02, pp. 889-949, defendants' motion for post-trial relief at P17, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52, 54-56. *See also*, N.T. 11/25/02, pp. 48-50; N.T. 5/3/02, pp. 1140-48.

(32) As a matter of law, neither Mr. Epstein individually nor SGR converted the property of plaintiff because they were justified in refusing to turn over the

referral fee while they litigated her right to such fee in the first instance. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P18, and defendants' memorandum of law in support of their motion for post-trial relief at 54-56. *See also*, N.T. 11/25/02, pp. 48-50; N.T. 5/2/02, pp. 908, 919-26, 928-29, 931-34.

(33) The jury's verdict with respect to the amount of damages suffered by plaintiff Nancy Kanter arising from any conversion of funds was against the weight of the evidence. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P19. *See also*, N.T. 11/25/02, pp. 48-50.

(34) The complaint against Mr. Epstein, Esquire, individually and/or Spector Gadon & Rosen P.C. did not set forth a claim for conversion of the property of plaintiff Nancy Kanter. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P20. *See also*, N.T. 11/25/02, pp. 48-50; *See also*, N.T. 5/2/02, pp. 889-949.

(35) The trial court erred in permitting the claim of conversion to be considered by the jury and giving a charge on that claim because (a) there was no legal or factual basis for so doing, (b) the charge given was erroneous, and (c) the trial court's actions were prejudicial to the defendants. Mr. Epstein preserved this issue in defendants' proposed jury instruction no. 21; defendants' motion for post-trial relief at P21, and defendants' memorandum of law in support of their motion for post-trial relief at 68-70. *See also*, N.T. 11/25/02, pp. 48-50; N.T. 5/6/02, pp. 1252-54.

(36) The court erred in failing to grant the motions for a directed verdict made during the trial by Mr. Epstein, Esquire, and Spector Gadon & Rosen P.C. Mr. Epstein

preserved this issue in defendants' motion for post-trial relief at P22. *See also*, N.T. 5/2/02, pp. 889-932; *id.*, pp. 932-49; N.T. 5/6/02, pp. 1140-56.

(37) The trial court erred in denying the motions in limine filed prior to trial by Mr. Epstein and SGR. Mr. Epstein preserved this issue in defendants' motion in limine, which the court denied. *See* N.T. 4/29/02, pp. 3-20.

(38) The trial court erred in admitting evidence relating to the individual liability of Mr. Epstein and his capacity to contract for the payment of a referral fee to plaintiff individually or as an agent of SGR. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P26, and in defendants' motion in limine, which the court denied. *See* N.T. 4/29/02, p. 3.

(39) The trial court erred in admitting evidence relating to the liability of SGR as a successor or assignee of an agreement for the payment of a referral fee to plaintiff. This issue was preserved in defendants' motion for post-trial relief at P27, and in defendants' motion in limine, which the court denied. *See* N.T. 4/29/02, p. 3.

(40) The trial court erred in commenting to the jury upon the status of plaintiff as guardian ad litem and the guardian of the estate of Tara M. Mr. Epstein preserved this issue in arguments set forth in N.T. 4/29/02, pp. 26-27, 27-34, 117; N.T. 4/30/02, pp. 333, 340-43, 366, 371-73; defendants' motion for post-trial relief at P28, and defendants' memorandum of law in support of their motion for post-trial relief at 64-68. *See also*, N.T. 11/25/02, pp. 49-50.

(41) The trial court erred in restricting defendants' rights to introduce evidence concerning the scope of plaintiff's guardianship of Tara M. Mr. Epstein preserved

this issue in N.T. 4/29/02, pp. 26-27, 27-34, 117; N.T. 4/30/02, pp. 333, 340-43, 366, 371-73; defendants' motion for post-trial relief at P29, and defendants' memorandum of law in support of their motion for post-trial relief at 64-68.

(42) The trial court erred in admitting evidence on the issue of conversion. Mr. Epstein preserved this issue in defendants' motion for post-trial relief at P30, and in defendants' motion in limine, which the court denied. *See* N.T. 4/29/02, p. 3.

(43) The trial court erred in its instructions to the jury when the court referred to Mr. Epstein, it included the professional corporations with which he was associated, in particular Jablon, Epstein, Wolf and Drucker P.C. and SGR. This issue is preserved in the arguments set forth at N.T. 5/6/02, pp. 1424-26, 1428; defendants' motion for post-trial relief at P31.a, and defendants' memorandum of law in support of their motion for post-trial relief at 75-76.

(44) The trial court erred in its instructions to the jury when the court instructed the jury that referral fees, which plaintiff was seeking in this case, were common, ordinary and routine, which improperly and wrongfully instructed the jury that guardians of an estate, like plaintiff, were able to simultaneously pursue a case on behalf of their charge, and have a direct pecuniary interest in the outcome. This issue is preserved in the arguments set forth at N.T. 5/3/02, pp. 1205-24; N.T. 5/6/02, pp. 1259-64, 1266-74, 1362-63, 1382, 1397-1400, 1429-34. Defendants' motion for post-trial relief at P31.b, and defendants' memorandum of law in support of their motion for post-trial relief at 71-74.

(45) The trial court erred in its instructions to the jury when the court instructed the jury that SGR could be liable for a referral fee agreement made by Mr. Epstein on any one of five different theories (successor liability, merger, implication, assignment and agency), thereby effectively instructing the jury improperly to find liability against SGR. This issue is preserved in the arguments set forth at N.T. 5/3/02, pp. 1183-95, 1201-1204, 1227-28; N.T. 5/6/02, pp. 1250-51, 1404-1405, 1414-19, 1428, 1437-38; and defendants' motion for post-trial relief at P31.c.

(46) The trial court erred in its instructions to the jury when the court instructed the jury that SGR could be liable as a result of the negligence of Mr. Epstein even though negligence was never an issue in the case. This issue is preserved in the arguments set forth at N.T. 5/6/02, pp. 1401-1402, defendants' motion for post-trial relief at P31.d, and defendants' memorandum of law in support of their motion for post-trial relief at 76-77. *See also*, N.T. 11/25/02, p. 51.

(47) The trial court erred in its instructions to the jury when the court instructed the jury that the scope of plaintiff's guardianship of Tara M. was narrowly limited despite an order of the orphans' court to the contrary. Defendants' motion for post-trial relief at P31.e.

(48) The trial court erred in its instructions to the jury when the court instructed the jury that Mr. Epstein and/or SGR could be liable for conversion. Defendants' motion for post-trial relief at P31.f; and defendants' memorandum of law in support of their motion for post-trial relief at 68-70.

(49) The trial court erred when the court failed to instruct the jury that plaintiff did not have the right as a

guardian of Tara M. to enter into an agreement for the payment to her of a referral fee. This issue is preserved in the arguments set forth at N.T. 5/3/02, pp. 1233-37; defendants' proposed jury instructions no. 18; defendants' motion for post-trial relief at P32.b, and defendants' memorandum of law in support of their motion for post-trial relief at 78-79.

(50) Mr. Epstein incorporates any and all matters listed by defendant Spector Gadon & Rosen not listed herein, as well as all citations to the record.

C. *Defendant SGR Raised the Following Issues in Its 1925(b)* Statement

(1) The trial court erred in granting to plaintiff the option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000 without the necessity of a new trial, where the plaintiff's only claim of error with respect to the jury's finding for defendant on the issue of liability for punitive damages was that defendants failed and/or refused to produce financial information ordered by the court, which is a claim that is relevant only to the amount of punitive damages and not defendants' liability therefore. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(2) The trial court's order granting to plaintiff the option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000, as to which plaintiff opted for an award of punitive damages in

the amount of $645,000 without the necessity of a new trial, deprived defendants of their right to a jury trial on the issue of punitive damages guaranteed under the constitutions of the United States and this Commonwealth. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Despite this, SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(3) The trial court's order granting to plaintiff the option of a new trial on the issue of punitive damages or an award of punitive damages in the amount of $645,000, as to which plaintiff opted for an award of punitive damages in the amount of $645,000, without the necessity of a new trial, deprived defendants of their right to a due process of law. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Despite this, SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and further addressed the issue in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(4) The trial court erred in granting plaintiff a new trial on her claim for punitive damages. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and further addressed this issue as a claim of error in

defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(5) The trial court erred in ordering post-verdict asset discovery of defendants where the jury found defendants were not liable for punitive damages, where no viable issue for a new trial on punitive damages was raised and where no new trial as to punitive damages had been ordered. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 9-16 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 5/9/02, pp. 235-36; N.T. 11/25/02, pp. 47-48.

(6) The trial court erred in ordering an additur with respect to the award of compensatory damages to plaintiff. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 2-6. *See also*, N.T. 11/25/02, pp. 41-43, 46.

(7) The trial court erred in ordering an additur with respect to the award of compensatory damages to plaintiff where the evidence produced provided an alternative basis for calculating a damage award based on hourly billings by plaintiff. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 2-6. *See also*, N.T. 11/25/02, pp. 41-43, 46.

(8) The trial court erred in awarding pre-judgment interest where the claim for compensatory damages was not a claim for a readily ascertainable sum. SGR preserved this issue in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 6-8. *See also*, N.T. 11/25/02, pp. 40-42.

(9) The trial court committed reversible error in its order of March 10, 2003, by granting plaintiff's requests for post-judgment interest because the verdict was against the weight of the evidence and plaintiff failed to establish her claims for conversion and breach of contract at the trial as a matter of law. SGR preserved this issue before the trial court by arguing contra to plaintiff's requests for pre-judgment interest in defendants' reply brief in opposition to plaintiff's post-trial motion and memorandum of law at 8-9 and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 11/25/02, p. 42.

(10) The trial court committed reversible error in its order of March 10, 2003, by granting plaintiff's requests for citations for contempt and directing defendants to pay the court $7,500, and directing defendant Alan B. Epstein, Esquire, to pay the plaintiff $26,500, and defendant SGR to pay plaintiff $53,000 without a formal motion for contempt and without a hearing. SGR preserved this issue before the trial court by arguing contra to plaintiff's requests for citations for contempt in its opposition to plaintiff's motions for contempt and for attorneys' fees under 42 Pa.C.S. § 2503 and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22.

(11) The trial court committed reversible error in its orders of December 30, 2002 and January 10, 2003, by granting plaintiff's requests for discovery pursuant to plaintiff's requests for citations for contempt. SGR preserved this issue before the trial court by arguing contra to plaintiff's requests for discovery pursuant to plaintiffs' requests for citations for contempt in defendant's opposition to post-trial discovery proposed by plaintiff and

plaintiff's supplemental memorandum of law regarding the relevancy of Epstein's entireties property and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(12) The trial court committed reversible error in its order of March 10, 2003, by finding SGR in contempt for failing to comply with the court's January 15, 2003 order. SGR preserved this issue before the trial court by arguing contra to plaintiff's requests for discovery pursuant to plaintiff's requests for citations for contempt in defendants' opposition to post-trial discovery proposed by plaintiff and plaintiff's supplemental memorandum of law regarding the relevancy of Epstein's entireties property and by raising this issue at oral argument on the post-trial motions before the trial court. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(13) The trial court erred in finding defendant SGR in contempt of court because (1) the order allegedly violated was not clear, definite and specific and/or (2) there was an absence of any evidence that defendants violated the order, and/or (3) assuming arguendo a violation of an order of the court, there was an absence of any evidence that defendants willfully violated the order. SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 10-12, and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(14) The trial court erred in finding defendant SGR in contempt of court without a hearing. SGR preserved this issue in defendants' answer to the rule to show cause

and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(15) The trial court denied defendant its constitutional right to due process of law guaranteed under the constitutions of the United States and/or this Commonwealth in finding defendant SGR in contempt of court. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(16) The trial court erred in imposing fines on defendant SGR for contempt of court without a hearing. This issue was first presented in the trial court's order of March 10, 2003, granting relief beyond that requested by plaintiff in plaintiff's post-trial motions. Despite this, SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(17) The trial court denied defendant its constitutional right to due process of law guaranteed under the constitutions of the United States and/or this Commonwealth in imposing fines on defendant SGR for contempt of court without a hearing. This issue was first presented in the trial court's order of March 10, 2003, granting relief

beyond that requested by plaintiff in plaintiff's post-trial motions. Despite this, SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 1-12 and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 4-8, 15-16, 19-22, 56-61.

(18) The trial court erred in imposing attorneys' fees as a sanction against defendant SGR without any evidence presented as to entitlement to attorneys' fees, the reasonableness of such fees or whether such fees were the result of conduct by SGR. SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 12-22, in defendants' memorandum of law in opposition to plaintiff's motion for 42 Pa.C.S. § 2503 sanctions and supporting memorandum of law at 11, and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 30-33, 56-58.

(19) The trial court erred in imposing attorneys' fees as a sanction against defendant SGR without a hearing. SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 12-22, in defendants' memorandum of law in opposition to plaintiff's motion for 42 Pa.C.S. § 2503 sanctions and supporting memorandum of law at 11, and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 30-33, 56-58.

(20) The trial court denied defendant its constitutional right to due process of law guaranteed under the constitutions of the United States and/or this Commonwealth in imposing

attorneys' fees as a sanction against defendant SGR without a hearing. SGR preserved this issue in defendants' answer to the rule to show cause and supporting memorandum at 12-22, and further addressed this issue as a claim of error in defendants' motion for stay filed March 13, 2003 at 5. *See also*, N.T. 11/25/02, pp. 30-33, 56-58.

(21) The trial court erred in issuing its March 10, 2003 order when a supersedeas was in effect pursuant to Pa.R.A.P. 1701 et seq. SGR preserved this issue in its motion to vacate filed March 28, 2003.

(22) The trial court erred in issuing its January 15, 2003 order when a supersedeas was in effect pursuant to Pa.R.A.P. 1701 et seq. SGR preserved this issue in its motion to vacate filed March 28, 2003.

(23) The trial court erred in issuing its January 10, 2003 order when a supersedeas was in effect pursuant to Pa.R.A.P. 1701 et seq. SGR preserved this issue in its motion to vacate filed March 28, 2003.

(24) The jury's verdict that SGR was liable for the payment of a referral fee to plaintiff was contrary to the law of the Commonwealth of Pennsylvania. This issue was preserved in defendants' motion for post-trial relief at P3, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28. *See also*, N.T. 11/25/02, pp. 48-49.

(25) The jury's verdict that SGR was liable for the payment of a referral fee to plaintiff was against the weight of the evidence. SGR preserved this issue in defendants' motion for post-trial relief at P4, and defendants' memorandum of law in support of their motion for post-trial relief at 31-34. *See also*, N.T. 11/25/02, pp. 48-49.

(26) The evidence presented at trial was insufficient as a matter of law to establish that SGR entered into an agreement for the payment of a referral fee to plaintiff. SGR preserved this issue in argument on motion for directed verdict, N.T. 5/2/02, pp. 890-91, defendants' motion for post-trial relief at P5, and defendants' memorandum of law in support of their motion for post-trial relief at 31-34, 48-50. *See also*, N.T. 11/25/02, pp. 48-49.

(27) The evidence presented at trial was insufficient as a matter of law to establish that SGR breached an agreement for the payment of a referral fee to plaintiff. SGR preserved this issue in argument on motion for directed verdict, N.T. 5/2/02, pp. 890-91, defendants' motion for post-trial relief at P6, and defendants' memorandum of law in support of their motion for post-trial relief at 31-34, 48-50 *See also*, N.T. 11/25/02, pp. 48-49.

(28) Any agreement for the payment of a referral fee made between plaintiff and Alan B. Epstein, Esquire, individually, was unenforceable as a matter of law because plaintiff as guardian ad litem and guardian of the estate of Tara M., as a matter of law could not contract for or receive a referral fee from the proceeds paid to the estate of Tara M. SGR preserved this issue in defendants' motion for post-trial relief at P9, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52. *See also*, N.T. 11/25/02, pp. 48-49.

(29) Any agreement for the payment of a referral fee made between plaintiff and Alan B. Epstein, Esquire, individually, was unenforceable as a matter of law because Epstein lacked the legal capacity to enter into any such agreement. SGR preserved this issue in defendants' motion for post-trial relief at P10.

(30) Plaintiff was precluded as a matter of law from asserting a claim for a referral fee against Alan B. Epstein, Esquire, as an officer or stockholder of Jablon, Epstein, Wolf & Drucker P.C. SGR preserved this issue in defendants' motion for post-trial relief at P11.

(31) As a matter of law, SGR was not an assignee or successor in interest or otherwise obligated under any agreement made for the payment of a referral fee to plaintiff. SGR preserved this issue in defendants' motion for post-trial relief at P12, and defendants' memorandum of law in support of their motion for post-trial relief at 44-47.

(32) There was insufficient evidence produced at trial to establish that, as a matter of fact, SGR was an assignee or successor in interest to any agreement made for the payment of a referral fee to plaintiff. SGR preserved this issue in defendants' motion for post-trial relief at P13, and defendants' memorandum of law in support of their motion for post-trial relief at 44-47.

(33) The jury's verdict with respect to the damages awarded to plaintiff was against the weight of the evidence. Defendants' motion for post-trial relief at PP7, 19.

(34) There was insufficient evidence to support the jury's award of damages to plaintiff.

(35) The trial court erred in permitting plaintiff to present the expert testimony of James Schwartzman, Esquire, because that testimony (a) went to a legal issue only, on which the trial court had previously ruled, (b) was irrelevant to the issues to be resolved by the jury, and (c) any relevance the testimony might have had was outweighed by its prejudicial effect on defendants. SGR

preserved this issue in motion in limine of defendants to preclude certain evidence, pp. 34-36; N.T. 4/29/02, pp. 4-20; N.T. 5/1/02, pp. 610-13; defendants' motion for post-trial relief at P14; and defendants' memorandum of law in support of their motion for post-trial relief at 57-64. *See also*, N.T. 11/25/02, p. 49.

(36) The jury's verdict that SGR converted the property of plaintiff was contrary to the law of the Commonwealth of Pennsylvania. SGR preserved this issue in defendants' motion for post-trial relief at P15, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52, 54-56.

(37) The jury's verdict that SGR tortiously converted the property of plaintiff was against the weight of the evidence. SGR preserved this issue in defendants' motion for post-trial relief at P16, and defendants' memorandum of law in support of their motion for post-trial relief at 54-56.

(38) The evidence presented at trial was insufficient as a matter of law, to establish that SGR converted the property of plaintiff. SGR preserved this issue in argument on motion for directed verdict, N.T. 5/2/02, pp. 89-92, 895-97, 903-905, 906-16, 916-21, 921-23, defendants' motion for post-trial relief at P17, and defendants' memorandum of law in support of their motion for post-trial relief at 23-28, 52, 54-56.

(39) As a matter of law, neither Alan B. Epstein, Esquire, individually, nor SGR converted the property of plaintiff because they were justified in refusing to turn over the referral fee while they litigated her right to such fee in the first instance. SGR preserved this issue in defendants' motion

for post-trial relief at P18, and defendants' memorandum of law in support of their motion for post-trial relief at 54-56.

(40) The trial court erred in permitting the claim of conversion to be considered by the jury and giving a charge on that claim because (a) there was no legal or factual basis for so doing, (b) the charge given was erroneous, and (c) the trial court's actions were prejudicial to the defendants. SGR preserved this issue in arguments set forth in defendants' proposed jury instruction no. 21, defendants' motion for post-trial relief at P21, and defendants' memorandum of law in support of their motion for post-trial relief at 68-70.

(41) The trial court erred in denying the motions in limine filed prior to trial by Alan B. Epstein, Esquire, and SGR. SGR preserved this issue in defendants' motion in limine.

(42) The trial court erred in admitting evidence relating to the individual liability of Alan B. Epstein, Esquire, and his capacity to contract for the payment of a referral fee to plaintiff individually or as an agent of SGR. SGR preserved this issue in defendants' motion for post-trial relief at P26.

(43) The trial court erred in admitting evidence relating to the liability of SGR as a successor or assignee of an agreement for the payment of a referral fee to plaintiff. SGR preserved this issue in defendants' motion for post-trial relief at P27.

(44) The trial court erred in commenting to the jury upon the status of plaintiff as guardian ad litem and the guardian of the estate of Tara M. SGR preserved this issue in arguments set forth in N.T. 4/29/02, pp. 26-27, 27-34,

117; N.T. 4/30/02, pp. 333, 340-43, 366, 371-73; defendants' motion for post-trial relief at P28, and defendants' memorandum of law in support of their motion for post-trial relief at 64-68. *See also*, N.T. 11/25/02, pp. 49-50.

(45) The trial court erred in restricting defendants' rights to introduce evidence concerning the scope of plaintiff's guardianship of Tara M. SGR preserved this issue in N.T. 4/29/02, pp. 26-27, 27-34, 117; N.T. 4/30/02, pp. 333, 340-43, 366, 371-73; defendants' motion for post-trial relief at P29, and defendants' memorandum of law in support of their motion for post-trial relief at 64-68. *See also*, N.T. 11/25/02, pp. 48-49.

(46) The trial court erred in admitting evidence on the issue of conversion. SGR preserved this issue in defendants' motion for post-trial relief at P30.

(47) The trial court erred in its instructions to the jury when the court referred to Alan Epstein, it included the professional corporations with which he was associated, in particular Jablon, Epstein, Wolf and Drucker P.C. and SGR. This issue is preserved in the arguments set forth at N.T. 5/6/02, pp. 1424-26, 1428, defendants' motion for post-trial relief at P31.a, and defendants' memorandum of law in support of their motion for post-trial relief at 75-76.

(48) The trial court erred in its instructions to the jury when the court instructed the jury that referral fees, which plaintiff was seeking in this case, were common, ordinary and routine, which improperly and wrongfully instructed the jury that guardians of an estate like plaintiff, were able to simultaneously pursue a case on behalf of their charge, and have a direct pecuniary interest in the outcome. This issue is preserved in the arguments set

forth at N.T. 5/3/02, pp. 1205-24; N.T. 5/6/02, pp. 1259-64, 1266-74, 1362-63, 1382, 1397-1400, 1429-34, defendants' motion for post-trial relief at P31.b, and defendants' memorandum of law in support of their motion for post-trial relief at 71-74. *See also*, N.T. 11/25/02, p. 50.

(49) The trial court erred in its instructions to the jury when the court instructed the jury that SGR could be liable for a referral fee agreement made by Alan Epstein on any one of five different theories (successor liability, merger, implication, assignment and agency), thereby effectively instructing the jury improperly to find liability against SGR. This issue is preserved in the arguments set forth at N.T. 5/3/02, pp. 1183-95, 1201-1204, 1227-28; N.T. 5/6/02, pp. 1250-51, 1404-1405, 1414-19, 1428, 1437-38, defendants' motion for post-trial relief at P31.c. *See also*, N.T. 11/25/02, p. 50.

(50) The trial court erred in its instructions to the jury when the court instructed the jury that SGR could be liable as a result of the negligence of Alan Epstein even though negligence was never at issue in the case. This issue is preserved in the arguments set forth at N.T. 5/6/02, pp. 1401-1402, defendants' motion for post-trial relief at P31.d, and defendants' memorandum of law in support of their motion for post-trial relief at 76-77. *See also*, N.T. 11/25/02, p. 51.

(51) The trial court erred in its instructions to the jury when the court instructed the jury that the scope of plaintiff's guardianship of Tara M. was narrowly limited despite an order of the orphans' court to the contrary. Defendants' motion for post-trial relief at P31.e. *See also*, N.T. 11/25/02, pp. 51-52.

(52) The trial court erred in its instructions to the jury when the court instructed the jury that Alan Epstein and/or SGR could be liable for conversion. Defendants' motion for post-trial relief at P31.f and defendants' memorandum of law in support of their motion for post-trial relief at 68-70.

(53) The trial court erred when the court failed to instruct the jury that plaintiff did not have the right as a guardian of Tara M. to enter into an agreement for the payment to her of a referral fee. This issue is preserved in the arguments set forth at N.T. 5/3/02, pp. 1233-37; defendants' proposed jury instructions no. 18; defendants' motion for post-trial relief at P32.b; and defendants' memorandum of law in support of their motion for post-trial relief at 78-79.

(54) The trial court erred in submitting plaintiff's claim for breach of contract to the jury because plaintiff never pleaded a claim for breach of contract in her complaint. SGR raised this issue in its motion in limine at 17-18 and in defendants' motion for post-trial relief at P8, and defendants' memorandum of law in support of their motion for post-trial relief at 30-32. *See also*, N.T. 11/25/02, pp. 48-49.

(55) The trial court erred in submitting plaintiff's claim for conversion to the jury because plaintiff never pleaded a claim for conversion in her complaint. SGR raised this issue in its motion in limine at 17-18 and in defendants' motion for post-trial relief at P20, and defendants' memorandum of law in support of their motion for post-trial relief at 30-32. *See also*, N.T. 11/25/02, pp. 48-49.

(56) SGR incorporates herein any arguments raised in co-defendant Alan Epstein's statement of matters complained of on appeal.

III. PRELIMINARY STATEMENT BY THE COURT

This case is about *improper behavior* by an attorney, defendant Alan B. Epstein and the law firm with which he was a partner, Spector Gadon & Rosen P.C., arising out of an agreement to pay a referral fee to plaintiff.

During the course of this litigation, the defendants continued their pattern of improper behavior: they ignored verbal orders from this court to provide documents during the punitive damages stage of the trial; they did not provide ordered discovery during the post-trial period; and they took judgment and filed an appeal after they agreed in open court to an extension of Pa.R.C.P. 227.4(b). Finally, we served on defendants 1925(b) orders, mandating that they *set forth issues that they actually intend to raise on appeal.* We gave counsel a full month to make these determinations. Nevertheless, counsel for *defendant Epstein responded by setting forth 49 issues and counsel for defendant SGR raised 55 issues, in addition to an incorporation* by reference of the issues set forth by each other, *for a total of 104 issues each.*

This went beyond lawyering, and was *another attempt to overwhelm and overburden this court and pervert the court system.*

IV. DISCUSSION

A. *Autho: 'ty of the Court To Act*

Defendants contend that we had no authority to issue orders after they filed notices of appeal on January 9, 2003.

We believed, at the time, that the appeals filed by the defendants should have been quashed by the Superior Court as premature.

On November 25, 2002, the defendants agreed in open court to an extension of Pa.R.C.P. 227.4 to March 14, 2003. The agreement was transcribed by the court reporter and is clear and unambiguous. Therefore, the court had until that date to act on the various motions for post-trial relief. We believe that defendants acted improperly when they filed praecipes to enter judgment on January 8, 2003, and filed two notices of appeal on January 9, 2003.[3]

On January 10, 2003 and January 15, 2003, we issued orders relating to post-trial discovery and defendants filed appeals of those orders.[4]

On January 16, 2003, the defendants filed with the Superior Court a "Petition for the issuance of a writ of prohibition restraining the Honorable Joseph I. Papalini from exceeding jurisdiction of his court and petition for expedited consideration." On January 22, 2003, we wrote to the prothonotary of the Superior Court with a copy to Superior Court Judge Robert Graci, requesting that the

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[3] 186 EDA 2003; 187 EDA 2003.

[4] 300 EDA 2003; 301 EDA 2003. Both appeals were subsequently quashed.

appeals be quashed as premature. *On January 22, 2003, Judge Graci denied the defendants' petition for the issuance of a writ of prohibition.* On January 24, 2003, plaintiff filed a motion in Superior Court to quash all of defendants' appeals.

On March 10, 2003, we issued our order disposing of the post-trial issues.

On March 25, 2003, the Superior Court quashed appeals 300 EDA 2003 and 301 EDA 2003, and on March 26, 2003, the court quashed appeals no. 299 EDA 2003 and 302 EDA 2003. On March 25, 2003, the court denied the plaintiff's motion to quash appeals 186 EDA 2003 and 187 EDA 2003, without prejudice to the right of plaintiff to raise the procedural issue when they argue the merits of the appeals.

Thus, it was not until March 25, 2003, that we were actually on notice that our jurisdiction to act was circumscribed by Pa.R.A.P. 1701.

All of our orders relating to this case were filed prior to March 14, 2003, the Rule 227.4 extension date, with the exception of our order of April 11, 2003, which was issued in response to *defendants'* motions which were filed on March 13, 2003 and March 28, 2003.

B. *Sufficiency and Weight of the Evidence*

The defendants asserted that breach of contract was not alleged in plaintiff's complaint; therefore there could be no recovery.

They also asserted that there was insufficient evidence to support the decision of the jury that there was a

contract between plaintiff and defendant Epstein and that the decision of the jury was against the weight of the evidence.

A trial court must enter judgment notwithstanding the verdict only if the movant is entitled to judgment as a matter of law or if the evidence is such that no two reasonable minds could disagree that the outcome should have been rendered in favor of the movant. A lower court's grant or denial of a judgment notwithstanding the verdict will be disturbed only for an abuse of discretion or an error of law. *Lockwood v. City of Pittsburgh*, 561 Pa. 515, 519, 751 A.2d 1136, 1138 (2000); *Moure v. Raeuchle*, 529 Pa. 394, 402, 604 A.2d 1003, 1007 (1992).

A new trial should be awarded on the ground that the verdict is against the weight of the evidence when the verdict of the jury is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail. *Gunn v. Grossman*, 2000 PA Super 48, 748 A.2d 1235 (Pa. Super. 2000), *appeal denied*, 564 Pa. 700, 764 A.2d 1070 (2000); *Martin v. Evans*, 551 Pa. 496, 501, 711 A.2d 458, 461 (1998); *Houseknecht v. Walters*, 404 Pa. Super. 85, 590 A.2d 20 (1991); *Kopeika v. Medical Services Association*, 347 Pa. Super. 500, 500 A.2d 1168 (1985); *Ditz v. Marshall*, 259 Pa. Super. 31, 393 A.2d 701 (1978).

The evidence presented by plaintiff was as follows: This action arose from an underlying federal civil rights action which was brought on behalf of Tara M., who was born on April 10, 1987. When she was still an infant, she was placed in the custody of the City of Philadelphia and was placed in a series of foster homes. In 1990, Tara M. was legally separated from her mother and in 1991,

Philadelphia Family Court appointed plaintiff as the child advocate attorney for the child. In 1996, Tara M. was attacked and horribly abused by the foster family with whom she was living. While she was hospitalized, cash donations in the amount of $830 were made on her behalf by the general public.

Plaintiff petitioned the orphans' court of Philadelphia to set up a bank account for the donations. On March 19, 1996, Judge Kathryn S. Lewis, appointed plaintiff as guardian ad litem of Tara M. *solely* for the purposes of setting up the bank account to deposit the public donations. In April of 1996, Judge Lewis issued a second order, authorizing plaintiff to receive the $830. The funds were to be held in the account until Tara M. reached the age of 18, or there was a further order of the court. Other than establishing the custodial account, plaintiff had no further duties as guardian ad litem of any aspect of Tara M.'s affairs.

Plaintiff determined that a civil suit should be brought on behalf of Tara M. She decided to refer the matter to an experienced litigator of civil rights cases. Plaintiff interviewed two such litigators. She met with defendant Epstein in March of 1996. A follow-up meeting took place in April of 1996. Epstein indicated that if he agreed to take the case, his fee would be one third of the recovery or the hourly charges, whichever was greater. *At that point, plaintiff told Epstein that she wanted a one third referral fee, which would be taken from Epstein's fees, and he agreed to that.* (N.T. 4/29/02, pp. 133-34.) One of plaintiff's motivations in asking for the referral fee was her belief that the City of Philadelphia would retaliate against her for bringing suit against it.

In July of 1996, a formal agreement for defendant Epstein to represent Tara M. was signed by plaintiff and defendant Epstein, on behalf of his law firm Jablon, Epstein, Wolf & Drucker P.C. That contract did not set forth the terms of the oral referral fee agreement nor was the referral fee agreement ever committed to writing. (N.T. 146-47.)

There were numerous exchanges of letters and information between plaintiff and defendant Epstein about the case, until February 1997, when Epstein filed a complaint in the United States District Court for the Eastern District of Pennsylvania, captioned *Tara M., by the Guardian of her Estate, Nancy Kanter, Plaintiff v. City of Philadelphia et al., Defendants,* civil action no. 97-1041. The city then joined plaintiff as a third-party defendant, which she believed was retaliation against her for bringing the suit. Plaintiff continued to assist defendant Epstein with the suit, and Epstein never indicated that he thought there was a conflict of interest; he discussed the referral fee with her several times. (N.T. 169-71.)

In 1998, Epstein disbanded Jablon, Epstein, Wolf & Drucker P.C. and he merged his practice with the firm of Spector Gadon & Rosen P.C., where he became a partner. (N.T. 171-73.) The Tara M. litigation continued and plaintiff continued to work on the case with Epstein. The case went to mediation and plaintiff attended the sessions with Epstein. (N.T. 179.)

In 2000, Tara M. was adopted by her foster mother, Iris Rosario. At that point, her case was dismissed from dependency court and plaintiff's service as her child advocate was at an end. Months later, Ms. Rosario was

substituted as the new named plaintiff in the Tara M. case. (N.T. 185-86.)

The Tara M. action was settled for $4,310,000. Plaintiff's malpractice insurance carrier contributed $10,000 to the settlement, as per a demand made by the city. The settlement contribution on behalf of plaintiff was made by her carrier without her agreement. *The settlement agreement preserved plaintiff's right to make future claims in state court for her referral fee.* (N.T. 4/29/02, pp. 189-90, 219, 229-30.) *The firm, SGR received a fee of $1,293,000* and reimbursement of costs in the amount of $20,705.50. (N.T. 4/30/02, p. 315.)

After the Tara M. case was settled, *Epstein first offered plaintiff alternative payment of her referral fee, which would have come out of Tara M.'s share of the recovery. Plaintiff declined that offer.* (N.T. 4/29/02, pp. 203-205.) Plaintiff received no referral fee from either Epstein or SGR. (N.T. 4/30/02, p. 303.)

In addition to plaintiff's testimony about the referral fee, *Michael Forbes, Esquire,* testified that he attended a meeting with Epstein and plaintiff and that *Epstein unequivocally promised* to pay plaintiff the one-third referral fee. (N.T. 5/1/02, pp. 640-44.) *Jeffery Albert, Esquire,* also testified that Epstein *acknowledged that there was an agreement* between him and plaintiff to pay her a fee. (N.T. 691-92.)

Thus, there was sufficient evidence presented from which the jury could conclude that Epstein agreed to pay plaintiff a *referral fee* which amounted to *$431,000,* which was one-third of the fee recovered by his firm on behalf of Tara M. We also concluded that the finding of the jury that

a contract existed between plaintiff and defendant Epstein was not against the weight of the evidence.

There was also sufficient evidence presented that the firm SGR actually received the contingency fee in this case and withheld payment from plaintiff.

We concluded that defendant Epstein could not enter into a fee referral agreement on behalf of himself and the law firm of which he was a partner, disband the partnership, join another firm as a partner, and avoid payment to plaintiff. Defendant SGR was bound by the agreement between plaintiff and defendant Epstein. Therefore, defendant SGR was equally liable to plaintiff for breach of contract.

We also concluded that the evidence supported the finding of the jury that both defendants were liable in conversion.

"'Conversion is the deprivation of another's right of property in, or use or possession of, a chattel without . . . lawful justification.' . . . 'Money may be the subject of conversion.' . . . [The] failure to pay a debt is not conversion. . . . Once a [referral] fee has been received, the referral fee can be the subject of a conversion. Furthermore, the attorney's law firm can be vicariously liable for conversion." *Bernhardt v. Needleman*, 705 A.2d 875, 878-79 (Pa. Super. 1997).

In the case at bar, there was sufficient evidence from which the jury found that there was a valid referral agreement between plaintiff and defendant Epstein and that Epstein intentionally refused to pay plaintiff what was due her after the Tara M. settlement. The defendant law firm SGR was aware of the fee dispute and also made

a conscious decision not to pay plaintiff without even meeting with her personally. Therefore, SGR was liable in conversion both directly and vicariously.

We also concluded that plaintiff was not legally precluded from receiving the referral fee because she was Tara M.'s child advocate and guardian ad litem, because the referral fee was supposed to come from the defendants' share of the settlement, not the child's. We also concluded that the referral fee agreement did not become invalid simply because plaintiff was subsequently named as an additional defendant in the law suit and a settlement was tendered on her behalf by her legal malpractice carrier.

Furthermore, these issues were also presented to the jury, which nevertheless found in plaintiff's favor.

Moreover, although not presented to the jury, there was additional testimony offered to this court in camera *without the jury present,* which showed defendant Epstein's acknowledgement that he did owe plaintiff a referral fee.

The witness was Samuel C. Stretton, Esquire, an attorney specializing in attorney ethics:

> "Mr. Bochetto: Mr. Stretton is going to testify that at about the time that Nancy met with Alan Epstein originally, that she called Sam to make sure that it was okay that she took a referral fee as the child advocate. She explained all the circumstances to him and he said yes. I think it's okay." (N.T. 4/30/02, p. 356.)
>
> "Mr. Bochetto: Mr. Stretton was a colleague in the bar, he's well-known to specialize in attorney ethics, and he was called as a professional matter. . . . and that he spoke with Alan Epstein and

Alan Epstein admitted to Sam that yes, there was an understanding to pay Nancy a fee, but that his partners at Spector Gadon & Rosen were giving him a hard time." (N.T. 4/30/02, p. 357.)

"Mr. Bochetto: And during that conversation Mr. Epstein acknowledged that he did have an understanding to pay a fee to Ms. Kanter. That's not settlement negotiations." (N.T. 4/30/02, p. 359.)

"Mr. Bochetto: I am going to limit my questions to the circumstances under which Mr. Stretton had conversations with Mr. Epstein to see if they were formal settlement negotiations or simply conversations by professional colleagues. Okay?" (N.T. 4/30/02, p. 361.)

"The Witness: Samuel C. Stretton, S-T-R-E-T-T-O-N.

"The Court: For the record, please note that the examination is being conducted in limine without the jury being present. Go ahead.

"Direct Examination

"By Mr. Bochetto:

"Q: Good morning, Mr. Stretton. . . .

"Q: In or around March of 2001 did you have a conversation with Mr. Epstein?

"A: . . . I knew Alan for years. I knew Nancy for years. She and I worked together with the criminal justice committee section when I was chairman and she was very active with the family section that we had created. I knew Alan Epstein since about 1975. He was a good friend of mine, and is, as is Nancy. Nancy asked me to call him

to attempt to resolve the issues, so I placed a telephone – . . .

"Then she chose to retain your services and then I sent the file over.

"There was a second conversation, which was last year when I was sitting one morning at a restaurant having a cup of coffee waiting until the court system opened, and Alan Epstein walked by and came in and we talked again. . . .

"Q: Now, that second conversation was after a time when I was already representing Nancy Kanter, is that correct?

"A: That it was.

"Q: And you made no representations to Mr. Epstein at that time that you were representing Miss Kanter, did you?

"A: At that time he knew I wasn't. We just talked as friends because we wanted to try to resolve it, we felt bad they were fighting over it.

"Q: Let me focus on that, when you were talking as friends. During that conversation *did he acknowledge to you that yes, there had been an understanding to pay Nancy Kanter fees in connection with the Tara M. federal case?*

"A: That was during the first conversation he had during the two-week time period, *there was an acknowledgment.*

"Q: How about during the second conversation?

"A: During the second conversation it was focused on how can we resolve this because he still wanted to pay monies to Nancy because he felt bad about the situation, and he thought the

> world of Nancy Kanter and he enjoyed her friendship, and so he and I tried to craft an idea, and then I called Nancy and the idea essentially was that she would be appointed as guardian or some role and that she would be paid substantial fees, into six figures for that particular role. . . .
>
> "We were all friends and it's not worth giving up friendship as a member of the bar over money, that was my philosophy" (N.T. 4/30/02, pp. 362-65.) (emphasis added)

C. *Evidentiary Errors*

1. Expert Testimony Regarding Legal Ethics

We did not err in permitting *James Schwartzman, Esquire,* who was the chairman of the Pennsylvania Supreme Court's Disciplinary Board, to testify on plaintiff's behalf as an expert on legal ethics, regarding whether there was an ethical bar to the receipt by her of the referral fee. The court had ruled as a matter of law that there was no ethical bar, but the issues had been presented to the jury through testimony. Since these issues were beyond the ken of laymen, it was proper and in no way prejudicial to the defendants that the expert testimony was permitted.

2. Liability of the Parties

The defendants asserted that we erred in permitting the introduction of evidence relating to the individual liability of Epstein to contract for payment of a referral fee to plaintiff individually or as agent of SGR. They also contended that we erred in admitting evidence relating to

the liability of SGR as a successor or assignee of an agreement for the payment of a referral fee to plaintiff.

The defendants also contended that we erred in admitting evidence on the issue of conversion.

We concluded that both Epstein as an individual and SGR in its own right and vicariously could be liable to plaintiff for breach of contract and conversion. Therefore, the evidence was properly admitted.

3. Scope of Plaintiff's Guardianship

The defendants contended that we erred in restricting their right to introduce evidence concerning the scope of plaintiff's guardianship of Tara M. (Citing N.T. 4/29/02, pp. 26-27, 27-34, 117; N.T. 4/30/02, pp. 333, 340-43, 366, 371-73.)

The issue was the scope of plaintiff's appointment as guardian of Tara M. We held that the defendants could cross-examine plaintiff about that matter. However, the defendants could not ask the jury or other witnesses to make *inferences* about the scope of the two orders issued by Judge Lewis, beyond the clear language of the orders, because the petitions upon which the orders were granted were not presented.

Our ruling was proper.

D. *Jury Instruction*

The defendants contended that we erred in charging the jury as follows:

(1) When we linked defendant Epstein with Jablon, Epstein, Wolf and Drucker P.C. and with SGR (citing N.T. 5/6/02, pp. 1424-26, 1428);

(2) When we instructed the jury that defendant SGR could be liable for a referral fee agreement made by defendant Epstein on any one of five different theories (successor liability, merger, implication, assignment and agency), thereby effectively instructing the jury improperly to find liability against SGR (citing N.T. 5/3/02, pp. 1183-95, 1201-1204, 1227-28; N.T. 5/6/02, pp. 1250-51, 1404-1405, 1414-19, 1428, 1437-38);

(3) When the court instructed the jury that the scope of plaintiff's guardianship of Tara M. was narrowly limited despite an order of the orphans' court to the contrary;

(4) When the court instructed the jury that Mr. Epstein and/or SGR could be liable for conversion;

(5) When the court failed to instruct the jury that plaintiff did not have the right as a guardian of Tara M. to enter into an agreement for the payment to her of a referral fee. (Citing N.T. 5/3/02, pp. 1233-37.)

All of the above instructions were consistent with the evidence presented and were proper.

Finally, defendants also asserted that we erred when we charged the jury that SGR could be liable as a result of the negligence of Mr. Epstein even though negligence was never an issue in the case. (Citing N.T. 5/6/02, pp. 1401-1402.)

We instructed the jury in accordance with Pennsylvania Standard Suggested Civil Jury Instructions, 4.02. That instruction did refer to negligence, which was not an issue in the case. *No one brought that to the attention of the court during the charging conference.* Mr. Dugan raised the point for the first time after the charge was given. (N.T. 5/6/02, pp. 1401-1402.) We then gave the jury an amended charge on this issue:

> "Members of the jury, each of the counsel had indicated to ask me to correct, give a curative instruction on some statements that I made that may have been incorrect, and on one of them I do note that I read the charge, and I read it exactly from the book and I shouldn't have used one word in there. One was negligence, because there's no negligence here.
>
> "So here's what I want to tell you. When I read vicarious liability and I read charge 4.02 and 4.03, I mentioned the word 'negligence.' There is no negligence in this case. This case deals with whether there was a contract, whether there was a breach of the contract or whether there was conversion. Okay? So it's those three things. I improperly, when I was reading it, used the word 'negligence.' It just slipped through. So the counsel correctly stated for me to tell you that. Remember? So it's breach of contract, whether there was a contract, and conversion." (N.T. 5/6/02, pp. 1440-41.)

The court did err in mentioning negligence in our initial instruction. But we cured the error in our supplemental instruction, to which there was no further objection. (*See* N.T. 5/6/02, pp. 1448-53).

E. *Additur*

P[illegible]iff moved for an additur, contending that the verdict [illegible]s inadequate.

This court has the power to mold the verdict of the jury to conform to the finding of the jury on liability, so that the record accorded with the facts. *House of Pasta Inc. v. Mayo*, 303 Pa. Super. 298, 307, 449 A.2d 697, 701-702 (1982). We are permitted to increase the verdict by way of additur when we find that the award is inadequate as a matter of law. *Fiorenza v. Kohn*, 396 Pa. Super. 1, 4, 577 A.2d 1384, 1385-86 (1990).

In the case at bar, plaintiff presented evidence that she had entered into a referral fee agreement requiring defendant Epstein to pay to plaintiff one-third of any recovery of attorneys' fees, after expenses.

Defendant Epstein denied that there was any agreement at all.

The jury found in answer to interrogatories that there was a referral fee contract and that both defendants had breached it.

It is undisputed that the gross attorney fees received by SGR in connection with the Tara M. settlement was $1,313,705.50 and costs were $20,705. The net recovery to SGR was $1,293,000. One-third of that sum was $431,000.

The jury had no basis for awarding plaintiff half that amount. Therefore, we did not err in adding $215,500 to the verdict rendered by the jury, for a total verdict of $431,000.

F. *Pre- and Post-Judgment Interest*

To the above sum, we properly added pre-judgment interest at the rate of 6 percent from March 3, 2001, totaling $30,429, for a total award of $461,429, because the amount of damages ($431,000) was readily ascertainable. We also properly concluded that plaintiff was entitled to post-judgment interest.

G. *Notice of Claim for Punitive Damages*

The defendants alleged they were not put on notice of plaintiff's claim of punitive damages and even if they were, there was no case law supporting that claim. The records clearly contradict that claim:

> "The Court: Why isn't a complaint alleging punitive damages and a letter saying that he is going to be pursuing it, why isn't that sufficient notice that the plaintiff is pursuing punitive damages?" (N.T. 4/30/02, p. 246.)
>
> "The Court: Let me at least for the record indicate this:
>
> "The court has reviewed the *Needleman* case, which is 705 A.2d 875, Pennsylvania Superior Court 1997, in which the court had found that it's applicable in this case, and it says specifically this to the *Needleman* case: The trial court could find an attorney and/or affirm [sic], I would assume, personally liable for violating the terms of a referral agreement, and we have a referral agreement controversy in this case, even though he claimed that he was acting on behalf of a professional corporation, and we have the same allegation in this case.

> "An attorney who has admitted the existence of a referral agreement could not later deny the existence of the agreement, even though the claim was made that the agreement was fraudulently induced.
>
> "Once a legal fee has been received, a portion of that fee representing referral fee can be the subject of a conversion by the attorneys."

"And the Superior Court goes on to say conversion by an attorney and part of an attorney's fees received representing the amount owed to another attorney as a referral fee, which we have this in this case in brackets, was sufficient to sustain an award of punitive damages.

> "It would appear that the *Needleman* case is on point on this case, and the issue is whether or not you've been put on notice, if you agree that you were put on notice at the time that the complaint was filed and at the time that you received the letter from plaintiff's counsel. I can't see where you are saying that you were then not put on notice." (N.T. 4/30/02, p. 252.)

In addition to the above on April 23, 2002, plaintiff sent an additional letter to both defendants regarding the punitive damages and defendants did acknowledge receipt of same.

> "The Court: Let me read this for the record. April 23, 2002. Letter to Daniel Dugan and Alan Epstein.
>
> "This is to advise you in connection with the plaintiff's request for punitive damages. The plaintiff requires defendants to be prepared to

provide full and complete financial information concerning their net worth including but not limited to balance sheet, bank balance statements, valuation, financial statements, et cetera, during the appropriate phase of the trial so that the defendants could be examined as such. Thank you for your time and attention. Bochetto and Lentz, George Bochetto. (N.T. 4/30/02, pp. 260-61)

"Mr. Bochetto: This is a fax confirmation sheet that shows the date and time it was faxed, and it was sent regular mail and I believe Mr. Dugan will acknowledge he received it.

"Mr. Epstein: I received it, your honor. I received it at the end of the week.

"Mr. Dugan: I'm sure I saw it whenever it came in, your honor. 23rd, I think, was Wednesday of last week." (N.T. 4/30/02, p. 261.)

H. *Remedy With Respect to Punitive Damages*

The jury found that the defendants were liable to plaintiff for both breach of contract and conversion. The finding as to conversion supported the possibility of punitive damages and the second phase of the trial was held. *See Bernhardt v. Needleman, supra.*

Plaintiff then presented additional evidence to support their contention that the defendants "engaged in outrageous, malicious, wanton, reckless, willful or oppressive behavior."

Apparently, Mr. Epstein, despite the following comments of the Pennsylvania Supreme Court regarding his

actions a number of years before, continues to do whatever he pleases in the practice of law.

Defendant Epstein testified as of cross and admitted that in 1977 he and other associates left the firm of Adler, Barish, Daniels, Levin and Creskoff and started a new firm, Jablon, Epstein, Wolf & Drucker. Adler, Barish sued them for injunctive relief because the new firm was stealing their clients. The Supreme Court of Pennsylvania held that injunctive relief was appropriate and that the plaintiff could maintain an action for intentional interference with existing contractual relations. *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978).

The following quotes from the Supreme Court opinion were read to the jury:

> "The firm[, meaning the Adler Barish firm] received documents relating to cases for which it apparently had no file. Contrary to the firm's procedure, Epstein personally maintained files for some cases. Likewise, Epstein did not adhere to Adler Barish policy concerning certain fees. Adler Barish obtained a case which was assigned to Epstein. He sent the file to an out-of-state attorney for further handling. *Instead of turning over the forwarding fee to the firm, Epstein kept it for himself.* It appears that these events led to termination of Epstein's employment." (N.T. 5/9/02, pp. 72-73.) (482 Pa. at 421 n.5, 393 A.2d at 1178 n.5.) (emphasis added)

"The court concluded that appellees [quoted] 'engaged in illegal solicitation in complete and total disregard for the Code of Professional Responsibility' and thereby tortiously interfered with the contractual and business relations that

exist between Adler Barish and its clients.' It found equitable relief appropriate in view of appellees' 'avowed intentions . . . to continue their illegal solicitation.'" (N.T. 5/9/02, p. 78.) (482 Pa. at 423, 393 A.2d at 1178.) (emphasis added)

"We[, meaning the Supreme Court] find nothing in the '"rules of the game" which society has adopted' which sanctions appellees' conduct. Indeed, the rules which apply to those who enjoy the privilege of practicing law in this Commonwealth expressly disapprove appellees' method of obtaining clients. *Supra* part IIA, discussing Code of Professional Responsibility, DR 2-103(A). We find such a departure from 'recognized ethical codes' 'significant in evaluating the nature of [appellees'] conduct.'" (N.T. 5/9/02, pp. 83-84.) (482 Pa. at 434, 393 A.2d at 1184.) (footnote omitted)

The jury could conclude from that evidence that defendant Epstein was not a trustworthy person.

Nevertheless, in answer to jury interrogatories relating to punitive damages, the jury found that neither defendant Epstein nor defendant SGR "engaged in outrageous, malicious, wanton, reckless, willful or oppressive behavior."

Plaintiff requested that we award a new trial on the issue of punitive damages. The request was based on two factors: *(1) the failure of the defendants to reveal financial information; and (2) misleading comments made by defendants during the punitive damages phases of the trial.*

Ordinarily, the finding of the jury that there is no *liability* for punitive damages would preclude us from granting a new trial as to punitive damages, merely because not all pertinent financial information regarding assets was disclosed by the defendants and presented to the jury.

However, we concluded that numerous statements made by the defendants and their counsel had a very great likelihood of affecting the jury's determination that there was no liability for punitive damages.

The following exchange took place during the punitive damages phase of the trial. Mr. Dugan, counsel for SGR, questioned his witness, Steven Gadon, Esquire, senior partner of SGR, on direct examination:

> "Q. Okay. And is there any doubt in your mind that Spector, Gadon & Rosen *could honor the judgment* that this jury rendered for $215,500 if that becomes a final judgment?
>
> "A. I don't know how many times I have to say it, but *we will honor our obligations.* We have and we will continue to. It's a matter of pride. My name is on the letter-head, all right? So you want to make sure that the bills get paid and things are taken care of. You have to have some pride in your name and what you do, and we've tried to do that." (N.T. 5/9/02, p. 219.) (emphasis added)

In closing to the jury during the punitive damages phase of the case, defendant Alan B. Epstein, Esquire, stated:

> *"And as a result of your verdict,* determining whether or not under the law and the facts as given to you by his honor, the law and the facts that I don't necessarily agree with even to this day, but certainly you did and certainly the judge did, and certainly *I am bound by that* because that was your decision, you awarded her a substantially less amount of money." (N.T. 5/9/02, p. 253.) (emphasis added)

"We placed our faith in you, the jury. That's what the jury system is all about. You got a dispute. One person has a dispute with the other person. *You go to somebody in between and that person makes the final judgment. And that's what you did, and we are standing by that.*

"*You heard my commitment and Mr. Gadon's commitment to honor that commitment that you made for us.* You had to determine those issues. The judge told you you had to do that. . . .

"And you made the decision and that's what the courts are all about. And it's not wrong to do it that way. You decide it.

"And we told you from that witness stand and we told you in this writing here and we committed ourselves over and over and over again that *she will be compensated* when there is a final judgment in this case and at the appropriate time.

"This firm always stands by its commitments. I never had that money. *I went to my firm and said are you going to stand by this? And they said yes and I confirmed it. Whatever the end result was, whatever happened here, we would stand by it.*

"Do I stand here and tell you that I agree with you and agree with each one of you as to your view on this thing? No. No. It is a legitimate, honest belief that I didn't owe the money back then and I don't owe it now. Do I come before you and say that I won't stand by the commitment that I made because that's the rule of law? Of course I will. I practice law in this community every day." (N.T. 5/9/02, pp. 259-61.) (emphasis added)

Mr. Dugan, representing SGR stated in closing argument:

> "There's no doubt in the world, based on the testimony you've heard here, that *my firm can and would pay any judgment* that they have to pay." (N.T. 5/9/02, pp. 264-65.) (emphasis added)

In this case, plaintiff requested in her post-verdict motions that defendants be precluded from challenging the jury verdict by post-verdict motions or appeal as a result of the above statements.

The defendants responded that the above statements only reflected their intention to pay plaintiff the amount of the verdict after it became a "final judgment," meaning, after the court enters judgment against them and the judgment is not overturned after all appeals are exhausted. (N.T. 11/25/02, pp. 44-45.)

We denied plaintiff's motion because we concluded that it was not the *intent* of the defendants to waive post-trial motions and their appeal rights.

However, we also found that it *was* the *intent* of the defendants to *trick* and *mislead* the jury into believing that their award of $215,500 was a *final judgment* which would be paid *immediately* to plaintiff. It was misleading evidence and argument that the defendants had "good intentions" from the start, and it was *totally improper.*

The court is confident and believes that the *intentionally misleading statements* made by the defendants that they would pay the decision of the *jury caused the jury* to find that there was no basis for concluding that they "engaged in outrageous, malicious, wanton, reckless,

willful or oppressive behavior." The defendants' *deceitful* conduct *required* that we grant plaintiff relief.

We also believe that the defendants used delaying tactics throughout the trial, by making repeated, unnecessary objections and by their refusal to turn over financial information. Their tactics required numerous conferences outside of the presence of the jury and turned what should have been a several day trial (which they previously informed the jury at voir dire) into six days of testimony on the compensatory damages phase of the trial alone. Jury selection was on April 26, 2002. The punitive damages verdict was not until May 13, 2002.

We believe that this wore out the jurors to such an extent that they could no longer give the plaintiff their fair attention when the punitive damages phase of the trial began nine trial days after jury selection.[5]

Ordinarily, relief for the defendants' misconduct would be a new trial on the issue of punitive damages.

We concluded that post-verdict discovery was necessary in this case because *the defendants willfully and repeatedly refused to disclose their assets as ordered by this court prior to and during the punitive damages phase of the trial.*

---

[5] After the punitive damage verdict was rendered, the jury expressed to this court, in private conversation in the courtroom with no one else present, their exasperation: that they were led to believe by counsel that the case would end by Friday, May 3, 2002. Instead, on May 10, 2002, they were still deliberating the punitive damage claim and they decided that by May 13, 2002, they had to end their deliberations and return to their respective jobs.

On May 9, 2002, *prior* to start of the punitive damages trial, the court stated:

> "The Court: Counsel, counsel, I requested you last Friday, for both you and the defendant Spector Gadon, to present any and all net worth documents including tax returns, financial statements, et cetera. And I indicated that they would be applicable in the event that there is a punitive damages aspect.
>
> "For you to present just a profit sharing plan itself for $21,000 is well beyond any commonsense reading of what the court requires on a [sic] punitive damages and net worth and tax returns.
>
> "I find that you have violated the court order. I think it's clear. Why you would have done this is beyond me." (N.T. 5/9/02, pp. 5-6.)

Mr. Epstein and SGR's position was expressed as follows

> "Mr. Epstein: Yes, your honor. *I was asked to bring in financial documents that reflect my net worth,* period. I was not given an enumerated statement, as is required. But the fact is – " (N.T. 5/9/02, p. 4.) (emphasis added)

Yet Mr. Epstein stated he did not know what documents to take into court. He requires an enumerated statement or list from the court. Mr. Gadon (senior partner of SGR), is a *CPA* and he claims he did not know either, what to take to court for net worth purposes.

Counsel Dugan claimed they did not yet prepare 2001 tax returns; therefore, the court will get nothing from them.

According to their position, the litigants in any case will decide what is relevant or not relevant and not the court or the judge.

Mr. Dugan stated to this court:

> "Mr. Dugan: . . . The tax returns for 2001 have not yet been prepared, so they don't exist. And the financial statements have not been generated either.
>
> "The Court: Well, hold on a minute. Let's not be disingenuous. You may be correct that the tax returns for 2001 do not exist but 2000 does, 1999 does, 1998 does. Correct?
>
> "Mr. Dugan: Yeah, but what's the relevance of prior tax years when they're making the decision as to the net worth of Spector Gadon today?
>
> "The Court: Okay. Well, your statements are noted for the record. I find at least initially that this is a *violation* of the court order in which we had requested such on [sic] prior to the trial, but we'll have to deal with that at another date." (N.T. 5/9/02, p. 19.)

Plaintiff's attorney correctly requested what documents were required from the defendants and stated:

> "Mr. Bochetto: Here's what he's handing me, judge, a two-page document, computer generated, listing assets, supposedly listing assets and liabilities. No financial statements, no accountant reports, no statement of income, profits, losses, no tax returns. This is a 50-man law firm." (*See* N.T. 5/9/02, p. 17.)

Subsequently, the court stated:

> "The Court: Yes, I want to read it too. For the record, this indicates that this is to advise you. *This is a letter to Dugan and Epstein, from Bochetto & Lentz.* 'This is to advise you in connection with the plaintiff's request for punitive damages. Plaintiff requires defendants to be prepared to provide full and complete financial information concerning their net worth, including but not limited to balance sheets, balance statements, valuations, financial statements during appropriate phase of the trial so that the defendants can be examined as to such. Thank you for your time and attention. Signed by Bochetto.'" (N.T. 5/9/02, p. 28-29.) (emphasis added)

The defendants claim they had no idea what documents to present to the court to show net worth. (*See* N.T. of Mr. Epstein p. 5, line 6 to line 9.)

> "Mr. Epstein: You did not, your honor, specifically tell me to bring any specific documents. You had asked me to adhere to the letter that was given to me by Mr. Bochetto." (N.T. 5/9/02, p. 5.)

Regarding SGR: With Mr. Gadon, senior partner, on stand:

> "Mr. Bochetto: Excuse me, Mr. Gadon. On April 23, 2002, I forwarded a letter. This was in writing to Mr. Dugan, who was Spector Gadon & Rosen's lawyer, which outlined [sic] requires to be prepared to provide full and complete financial information, including but not limited to balance sheets, bank statements, valuations, financial statements, et cetera. . . ." (N.T. 5/9/02, p. 23.)

During the punitive damages phase of the trial, the only document that defendant Epstein disclosed was a profit sharing plan in the amount of $21,000, which he asserted was the only thing that he owned in his own name. (N. T. 5/9/02, pp. 4-7, 134.) Given the fact that defendant Epstein had been practicing law for 30 years, he was a partner and department chairman in a major law firm which grossed approximately 14 million dollars a year and he owned 10,000 shares of the firm's stock, we found that assertion to be disingenuous. (*See* N.T. 5/9/02, pp. 97, 133, 141-42, 197-98, 212.)

Thereafter, the defendants willfully refused all of our orders directing them to participate in post-verdict discovery. The recalcitrant positions taken by the defendants required that we formulate a unique solution. Thus, we sua sponte offered plaintiff an alternative. Plaintiff could receive a new trial on punitive damages (and expend additional resources on both the trial and continuation of the battle to get defendants to disclose their assets) or she could elect to receive the sum of $645,000 in punitive damages. That sum was formulated by the court and was approximately triple the amount originally awarded by the jury in actual damages, and one and a half times the amount ultimately reached by the court after the additur. Plaintiff elected to receive $645,000 in lieu of a new trial on punitive damages.

The election formulated by the court and accepted by the plaintiff was appropriate under the unique circumstances of this case.

I. *Contempt of Court*

The court issued a contempt citation against the defendants because of their failure to disclose financial information and subsequently because of their failure to comply with the orders of the court, post-trial.

Defendants asserted that we gave them no opportunity to present evidence on this issue. To the contrary, on September 17, 2002, we served upon the defendants a rule to show cause why they should not be held in civil contempt for failure to prepare and produce financial records at the punitive damages stage of the trial. The rule was returnable November 25, 2002. Defendants appeared on November 25, 2002, but presented no evidence in their behalf.

At that time, the court established a time-table for further discovery, none of which the defendants followed. They subsequently *ignored* all orders of the court.

On March 10, 2003, we ordered the defendants to pay $7,500 to the court of common pleas for their misconduct during the punitive damages portion of the trial. This represented costs of $2,500 per day for the three wasted days of trial.[6]

We ordered the defendants to pay plaintiff $124,219.86 in attorney's fees pursuant to 42 Pa.C.S. § 2503, which represented the documented expenditure by plaintiff's counsel relating to their efforts to make the defendants comply with the court's orders relating to punitive damages *only*.

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[6] The sum of $2,500 was determined several years ago as being the costs of staffing and running a courtroom. That amount is no doubt higher now.

We awarded plaintiff the sum of $26,500 in accrued fines to be paid by defendant Epstein and $53,000 in accrued fines to be paid by defendant SGR, because of their disregard of our order of January 15, 2003.

The defendants have caused both the court and counsel for plaintiff to expend documented hours of unnecessary labor because of their intentional and willful disregard of the orders of the court. They acted with contempt of the judicial system when they prematurely entered judgment and filed appeals. To contend that we have not given them *their* day in court to defend themselves is nothing less than disingenuous.

V. CONCLUSION

The legal system can only function if counsel are both competent and trustworthy.

In the case at bar, plaintiff Nancy Kanter, a member of the Pennsylvania Bar, trusted Alan B. Epstein, another member of the Pennsylvania Bar, to both handle the Tara M. case in a competent manner and adhere to the oral contingency fee agreement that they entered into.

In retrospect, plaintiff Kanter should have requested that the contingency fee contract be in writing. She was naive: she trusted defendant Epstein, as a fellow member of the bar. That trust was sorely misplaced.

Defendant Epstein breached the trust plaintiff had placed in him to deal fairly with her.

Defendant Spector Gadon & Rosen P.C. is equally liable for that breach of trust as both the employer of defendant Epstein and because they failed to make any

kind of independent investigation to verify the veracity of plaintiff's claims.

The defendants also breached their duty of fair dealing with plaintiff when they refused to turn over their financial records during the trial.

The defendants breached their duty of fair dealing with this court when they: willfully disregarded our verbal orders to provide plaintiff with documents relating to their financial assets; when they entered snap judgments after agreeing in open court to an extension of Rule 227.4; when they willfully disregarded the written orders of this court regarding post-trial discovery; when they filed multiple, premature appeals; and when they filed 1925(b) statements that raised substantially more issues than they will be permitted to address on appeal because of the limitations set forth in Pa.R.A.P. 2135.[7]

If the type of activity engaged in by the defendants were to be permitted, our court system would break down. Those attorneys who delay and obfuscate would be rewarded; while those who play by the rules would suffer. Our legal structure, which is based on honesty and fair play, would come to an end.

The orders of this court were intended to give full and complete redress to the plaintiff as well as to uphold the dignity and authority of the court system. They should be affirmed.

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[7] Rule 2135 provides that the body of appellate briefs shall not exceed 50 pages of conventional typographical printing or 70 pages of reproduction by any other process of duplicating or copying.

Editor's Note: Appealed to the Superior Court at nos. 186, 187, 924, 1161 EDA 2003.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NANCY KANTER, ESQUIRE	:	Nos. 130-31 EAL 2005
v.	:	Petitions for Allowance of Appeal from the Order of the Superior Court
ALAN B. EPSTEIN, ESQUIRE AND SPECTOR GADON & ROSEN, P.C.	:	
PETITION OF: SPENCER GADON & ROSEN, P.C.	:	

ORDER

PER CURIAM:

AND NOW, this 2nd day of August, 2005, the Petitions for Allowance of Appeal are hereby DENIED.

IN THE
IN THE [sic] SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 186, 187, 924 AND 1161 EDA 2003

NANCY KANTER, ESQUIRE,

Appellee at Nos. 186, 187 and 924 EDA 2003
Appellant at No. 1161 EDA 2003,

v.

ALAN B. EPSTEIN, ESQUIRE AND
SPECTOR GADON & ROSEN, P.C.,

Appellants at Nos. 186, 187 and 924 EDA 2003
Appellees at No. 1161 EDA 2003.

BRIEF OF SPECTOR GADON & ROSEN, P.C.

Appeal From The Judgments Entered In The
Court Of Common Pleas Of Philadelphia County,
On January 8, 2003, And On March 12, 2003
At December Term 2000, No.0758.

SPRAGUE & SPRAGUE

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* * *

[34-40]

C. The Trial Court's Award of Punitive Damages To Plaintiff Is Legally Unsupportable and Constitutionally Invalid

On May 13, 2002, the jury returned verdicts on Kanter's claims for punitive damages in favor of Epstein and SGR, with specific findings that Epstein and SGR were not liable to Kanter and had not "engaged in outrageous, malicious, wanton, reckless, willful or oppressive behavior. (R.1941a-1942a). This verdict represents the finding of the jury that Kanter had failed to prove her punitive damage claim against Epstein or SGR.

Plaintiff filed a motion for post-verdict relief with respect to punitive damages on the ground that defendants and their counsel engaged in trial misconduct by failing and refusing to produce documentary evidence relating to defendants' net worth and that the jury was deprived of the opportunity to consider that evidence of net worth. (R.2739a).

Despite the jury's finding of no liability for punitive damages and despite the fact that Kanter's only post-trial claim addressed the absence of evidence relating to defendants' net worth, on March 10, 2003, the trial court entered its Order stating in pertinent part, as follows:

> As to punitive damages, the court has concluded that Plaintiff is entitled to relief; Plaintiff may elect within thirty (30) days to accept either of the following remedies: i. A new trial on punitive damages only; or ii. The sum of $645,000 payable by Defendants to Plaintiff in full satisfaction of Plaintiff's claim for punitive damages.

See Exhibit "C" (R. 3230a).. In its Opinion of February 26, 2004, the trial court recited the evidence produced at the punitive damage phase of the trial alleged to support a finding of punitive damages (evidence considered and rejected by the jury) which evidence all pertained to Epstein and events in the 1970's – evidence totally irrelevant to SGR. Opinion at 72-73. Further, the trial court asserted that plaintiff sought a new trial on punitive damages on two grounds: (1) the failure of Defendants to reveal financial information; and (2) misleading comments made by defendants during the punitive damage phase of the trial." Opinion at 74. The trial court then specifically enumerated the "misleading statement" made by Mr. Gadon, the senior partner of SGR, to the effect that SGR would honor its obligation to pay the jury verdict if it became a final judgment. Opinion at 74-75. The trial court also referenced statements by Epstein in his closing that Kanter would be compensated when there is a final judgment in the case, and by counsel for SGR in his closing that any judgment would be paid. Opinion at 75-76. Based on these statements, the trial court found

> that it was the intent of the Defendants to trick and mislead the jury into believing that their award of $215,000 was a final judgment which would be paid immediately to Plaintiff. It was

> misleading evidence and argument that defendants had "good intentions" from the start, and it was totally improper.
>
> The Court is confident and believes that the intentionally misleading statements made by the Defendants that they would pay the decision of the jury caused the jury to find that there was no basis for concluding that they "engaged in outrageous, malicious, wanton, reckless, willful or oppressive behavior." The defendants' deceitful conduct required that we grant Plaintiff relief.

Opinion at 77. The trial court also justified its order on punitive damages by Defendants' "delaying tactics throughout the trial" and "by their refusal to turn over financial information." *Id.*

The trial court's order is reversible on multiple grounds. First, the order impermissibly negates a jury verdict in favor of defendants and against plaintiff on the issue of punitive damages on grounds for relief do not meet the requisite legal standard, and indeed, rely on impermissible criteria, as well as grounds that were not even raised by Kanter. Second, and more significantly, however, rather than merely granting a new trial on the issue of punitive damages, the trial court granted plaintiff the option of either accepting a new trial, or accepting an amount of punitive damages unilaterally determined by the trial court.[1] This unprecedented procedure deprived defendants of their right to a jury trial on the issue of punitive damages guaranteed under Article I, section 6 of

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[1] On March 12, 2003, plaintiff filed with the court an election to take the pre-determined amount of punitive damages of $645,000 set by the trial court. (R.3231a).

the Pennsylvania Constitution and the constitutional right to due process of law under Article I, section 1 of the Pennsylvania Constitution and under the Fourteenth Amendment to the Constitution of the United States.

1. The trial court erred in awarding a new trial on the issue of punitive damages.

In reviewing the trial court's grant of a new trial on the issue of punitive damages, this Court must determine whether the trial court committed an error of law which controlled the outcome of the case or committed an abuse of discretion. *Cangemi v. Cone,* 774 A.2d 1262, 1265 (Pa. Super. 2001). A new trial will be granted on the grounds that the verdict is against the weight of the evidence only where the verdict is so contrary to the evidence it shocks one's sense of justice. *Id.* 774 A.2d 1265. A new trial will not be granted on the ground that the verdict was against the weight of the evidence simply because the evidence was conflicting and the fact-finder could have decided in favor of either party. *S.N.T. Industries, Inc. v. Geanopulos,* 363 Pa. Super. 97, 104-05, 525 A.2d 736, 740 (1987). Moreover, facts relating to the conduct of the party after the verdict are not relevant to the issue of liability for punitive damages. *Bernhardt v. Needleman,* 705 A.2d 875, 879 (Pa. Super. 1997) (in awarding punitive damages, the proper focus is on the act itself together with all the circumstances . . . the focus, therefore, is on the conduct, not on the excuses offered at trial.); *Cf. Ridgeway v. U.S. Credit Life Ins. Co.,* 793 A.2d 972, 977-78 (Pa. Super. 2002).

The trial court's grounds for a new trial on the issue of punitive damages as to SGR in no way supports the grant of a new trial. Of the two bases cited by the trial court –

the failure of Defendants to reveal financial information; and (2) misleading comments made by defendants during the punitive damage phase of the trial – the record belies the trial court's finding. Mr. Gadon responded to all questions posed to him on the finances of SGR and produced two financial statements, as well as bringing with him two tax returns, upon which he was not questioned. (R.1827a-1868a). At the conclusion of his testimony, the trial court even thanked Mr. Gadon for his testimony. (R.1879a). Rather than demonstrating a failure to reveal financial information, the record discloses a good faith attempt by SGR to comply with the trial court's vague and indecisive requests to produce financial documents. *Id.*

So too, the trial court's alleged reliance on supposedly misleading statements made by defendants during the punitive damage phase of the trial is similarly inadequate to support an order for a new trial. In the first instance, reference to Kanter's post-trial motions shows Kanter never advanced as a basis for a new trial on punitive damages the issue of statements by defendants and their counsel that punitive damages would be paid. (R.2739a). That basis consequently is waived. Pa.R.C.P. 227.1(b). For the trial court to *sua sponte* raise an issue not raised by Kanter, and grant relief not requested by Kanter, demonstrates that the trial court crossed the line from being an impartial arbiter to being a partisan advocate.

Second, the statements of Mr. Gadon[2] and SGR's counsel's that any final judgment would be paid are

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[2] Indeed, the trial court's reliance on Mr. Gadon's testimony is a startling about face from the trial court's position at trial. The trial court expressly stated after the close of evidence of punitive damages:

perfectly proper and truthful statements. The trial court incongruously has interpreted those statements to mean that the *verdict* would be paid and that consequently, by pursuing post-trial and appellate remedies, SGR has deceived the jury. The trial court's interpretation, however, is insupportable and bespeaks an unfathomable lack of appreciation of the difference between a verdict and a final judgment. Under the law, a final judgment is well defined and does not include a verdict or decision of the court. *Lenhart v. Cigna Companies,* 824 A.2d 1193, 1196 (Pa. Super. 2003). There does not exist any final judgment in this action. Consequently, there cannot have been any deceit in statements to the effect that any final judgment would be duly paid, if, in fact, there exists any judgment to be paid following the exhaustion of appellate remedies. SGR cannot be punished by reason of its having availed itself of post-trial and appellate remedies. To punish a litigant for the pursuit of rights granted by rule, statute and constitution would be a violation of a party's rights

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> Hold on. The Court is not ruling, at least at this time, on any allegations of perjury or contempt. The review of the Needleman case indicates, apparently, that the Court below made the decision.
>
> This Court's decision is this. I am not personally making the decision regarding punitive damages. My only decision is that there is sufficient evidence from the record for the jury to make their own factual decision. I am not making it, the jury is. If the jury decides the facts and indicates that there is punitive damages in the amount, so be it. If the jury decides that this does not meet the criteria under the standard charge, so be it. But I think that there's sufficient evidence for the jury to make this decision. They are the fact finders, not myself.

(R.1877a-1878a).

under the Pennsylvania Constitution. Pa.Const. Art. 1, section 11 ("all courts shall be open; and every man for an injury done to him in his lands, good, person or reputation shall have remedy by due course of law").

Finally, it should be noted that the information which was allegedly provided to the jury related to the net worth of the defendants. The net worth of the defendants is only relevant to the issue of the amount of punitive damages to be awarded, not liability of punitive damages. At trial, the jury determined that there was no liability for punitive damages and the net worth evidence is irrelevant to the determination. Indeed, the entire concept of introduction of net worth evidence in support of punitive damages has been called into question by the United States Supreme Court in *State Farm Mut. Automobile Ins. Co. v. Campbell,* 538 U.S. 408 (2003) (calling into question the constitutional viability of basing a punitive damage award on the defendants' net worth.) Consequently, the trial court's award of a new trial on the issue of punitive damages is erroneous and must be reversed by this Court.

2. The award of a specific amount of punitive damages by the trial court at the election of plaintiff deprived Epstein and SGR of their constitutional right to a jury trial on the issue of punitive damages

Under the Pennsylvania Constitution, Art. 1, section 6, the right to "[t]rial by jury shall be as heretofore, and the right thereof remain inviolate." The right to a jury trial enshrined in the state constitution preserves the right to a jury that existed at the time the constitution was adopted. *Wertz v. Chapman Twp.,* 709 A.2d 428 (Pa. Cmwlth.1998), *aff'd* 559 Pa. 630, 741 A.2d 1272 (1998).

In *Mishoe v. Erie Insurance Co.*, 573 Pa. 267, 824 A.2d 1153 (2003), the Supreme Court of Pennsylvania rejected a claim that a party was entitled to a jury trial in an action under 42 Pa.C.S. § 8371 for insurance bad faith on the ground that the statute did not provide for a right to a jury trial and no analogous cause of action existed at common law. The Supreme Court expressly stated, however, that an award of punitive damages is traditionally within the domain of the jury. *Mishoe,* 573 Pa. at 277, 842 A.2d at 1158. Thus, the trial court's unilateral abrogation of the jury's role in the award of punitive damages is a direct infringement on Epstein and SGR's right to a jury trial under Art 1, section 6 of the Pennsylvania Constitution and must be reversed.

* * *

IN THE
IN THE [sic] SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

Nos. 186, 187, 924 AND 1161 EDA 2003

NANCY KANTER, ESQUIRE,

Appellee at Nos. 186, 187 and 924 EDA 2003
Appellant at No. 1161 EDA 2003,

v.

ALAN B. EPSTEIN, ESQUIRE AND
SPECTOR GADON & ROSEN, P.C.,

Appellants at Nos. 186, 187 and 924 EDA 2003
Appellees at No. 1161 EDA 2003 .

APPLICATION OF APPELLANT, SPECTOR, GADON & ROSEN, P.C., FOR RECONSIDERATION AND/OR REARGUMENT BEFORE THE COURT *EN BANC*

Application For Reconsideration And/Or Reargument *En Banc* Of The Order Of The Superior Court, Entered December 10, 2004, At No. 924 EDA 2003, Affirming The Judgment Of The Court Of Common Pleas Of Philadelphia County Entered On March 12, 2003, At December Term 2000, No. 0758.

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DATE: December 23, 2004

* * *

[4-6] Significantly, despite the panel's conclusion to the contrary, the record nowhere reflects prejudice to the trial court or opposing party due to SGR's Rule 1925(b) statement. Indeed, apart from a single reference in the trial court's Rule 1925 Opinion to the effect that SGR and Epstein raised substantially more issues in their Rule 1925 statements than they would be permitted to raise on appeal, *no* objection was ever made to the Rule 1925 statements filed by SGR.[1] Opposing counsel made *no*

[1] It should be noted that the express language of Pa.R.A.P. 1925(b) states that appellant may be directed to file and serve a "concise statement of matters complained of on appeal." There is neither a limit on the number of issues, nor any requirement in the rule that an appellant must limit the issues to precisely those issues which are subsequently actually raised before the appellate court. The most that can be said is that the rule requires a statement of issues that counsel contemplates will be raised on appeal. Any other interpretation of the rule would be contrary to the purpose of Rule 1925(b).

objection in the trial court or on appeal. The trial court *did not give* SGR, or SGR's counsel, any notice that there was any deficiency in their Rule 1925 statement, despite the fact that the Rule 1925 statement was filed in June 2003, and the trial court did not issue its Opinion until March 2004.[2] *No* motion to quash was filed by Kanter on this issue, nor did Kanter object in her brief to the number of issues raised by SGR or by Epstein. The panel *did not raise* any objection at oral argument. Thus, SGR and its appellate counsel were never afforded any opportunity to address any alleged deficiency in the Rule 1925 statement. As a result, SGR and its appellate counsel have been denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article 1, § 1 of the Pennsylvania Constitution. The denial of due process is a result of an effective denial of the right to appeal in that this Court has deemed waived all of the substantive issues raised by SGR without notice or opportunity to be heard. Indeed, as a result of this Court's decision, SGR has been denied any appellate review of the very substantial and important issues raised in this appeal, and appellate counsel has been exposed to claims of malpractice and professional incompetence in filing a Rule 1925 statement that did not offend any rule of appellate procedure, and in fact, was totally appropriate under the decisions cited above.

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[2] Moreover, the trial court's 80 page Opinion addressed the issues raised by SGR on appeal, including punitive damages (Tr. Ct. Op. at 69-82), contempt (Tr. Ct. Op. at 82-83), additur (Tr. Ct. Op. at 68-69), sanctions (Tr. Ct. Op. at 83; *see also* 77-82), the factual and legal sufficiency of plaintiff's claims (Tr. Ct. Op. at 54-63), post-verdict discovery (Tr. Ct. Op. at 78-81), and supersedeas (Tr. Ct. Op. at 52-54).

Moreover, the panel's decision elevates a procedural rule [Rule 1925] to a substantive objective, causing a draconian result in defiance of basic principles of fairness and due process. Indeed, precedent of the Supreme Court of Pennsylvania and this Court *en banc* consistently maintain that such an objective is improper and cannot be reconciled with Pa.R.A.P. 105's emphasis on a liberal and just interpretation and application of the appellate rules, particularly when no objection has been lodged by the opposing party at the trial court level. *Kurtas v. Kurtas*, 521 Pa. 105, 555 A.2d 804 (1989) (plurality opinion); *Millard v. Nagle*, 402 Pa. Super. 376, 587 A.2d 10 (1991) (*en banc*), *order aff'd*, 533 Pa. 410, 625 A.2d 641 (1993).

* * *

Excerpt at pages 11-12

B. NEITHER *SGR* NOR APPELLATE COUNSEL HAD ANY NOTICE OF, OR OPPORTUNITY TO BE HEARD WITH RESPECT TO, THE ISSUE OF WAIVER AND THEREFORE REARGUMENT AND/OR RECONSIDERATION *EN BANC* IS ESSENTIAL TO PREVENT A DENIAL OF DUE PROCESS OF LAW

By reason of the retrospective application of a heretofore unannounced rule of waiver, SGR has been deprived of any appellate review of the serious and significant substantive issues raised in its briefs and appellate counsel has been left open to potential claims of professional negligence. By reason of the findings of "misconduct," "breach of duty of good faith and fair dealing" and "chicanery," SGR and appellate counsel have been sanctioned and their professional reputations have been blackened. Despite these grievous consequences, at no

point in time has either SGR or appellate counsel been afforded any notice that waiver was an issue or given an opportunity to contest the finding of waiver or the basis underlying the finding of waiver and the allegations of misconduct. Fundamental notions of fairness, as well as the constitutional protections of due process of law mandated by both the United States and Pennsylvania Constitutions cannot and do not permit such a result.

In *Machipongo Land and Coal Company, Inc. v. Commonwealth of Pennsylvania, DER*, 544 Pa. 271, 274, 676 A.2d 199, 201 (1996), the Supreme Court of Pennsylvania recognized that it was inherently unfair to decide a case on grounds as to which the losing party had no notice and no opportunity to be heard. Accordingly, the Court granted reargument and gave the party the opportunity to contest the issue. The same right must apply herein. At no time did Appellee Kanter assert any waiver of issues based on the number of issues raised in the Rule 1925 statement. The trial court did not refuse to accept the Rule 1925 statement or deem any issue waived. This Court did not address the issue at oral argument. To the contrary, at argument, the panel demonstrated great appreciation of both the factual record and the legal issues presented. No mention was made of the number of issues raised. It is patently unfair to find waiver under these circumstances.

* * *

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT
Docket No.130 EAL 2005

NANCY KANTER, ESQ.,

Respondent,

v.

ALAN B. EPSTEIN, ESQ. and
SPECTOR GADON & ROSEN, P.C.,

Petitioners.

PETITION FOR ALLOWANCE OF APPEAL OF SPECTOR GADON & ROSEN, P.C.

Petition for Allowance of Appeal from the Superior Court's December 10, 2004 Order at 924 EDA 2003, Affirming the March 10, 2003 Order of the Court of Common Pleas of Philadelphia County, at No. 758, December Term, 2000

SPRAGUE & SPRAGUE

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DATED: March 11, 2005

* * *

[23-26]

B. Contrary to this Court's well established precedent, the Superior Court's waiver analysis arose from its *sua sponte* determination of an issue not raised by the litigants, which deprived the Spector Firm of due process and its constitutionally-based right of appeal

Time and again, this Court has admonished – and reversed – intermediate appellate courts for deciding issues *sua sponte*, without the benefit of briefing or argument from the litigants before it. *See Weigand v. Weigand*, 461 Pa. 482, 485, 337 A.2d 256, 257 (1975). As the *Weigand* Court explained, *sua sponte* determinations "disturb[] the processes of orderly judicial decision-making" by depriving "counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy." *Id.* at 485, 337 A.2d at 257.

Since *Weigand*, this Court has continued to reaffirm that "[i]ssues not preserved for appellate review may not be considered by an appellate court, even where the alleged error involves a basic or fundamental mistake." *Arthur v. Kuchar*, 546 Pa. 12, 21, 682 A.2d 1250, 1254 (1996) (citing *Reilly v. Southeastern Pa. Trans. Auth.*, 507 Pa. 204, 489 A.2d 1291 (1985)). *See also Witt v. Com., Dep't of Banking*, 493 Pa. 77, 82-83, 425 A.2d 374, 376 (1981) (recognizing this Court's "often stated admonition that courts should confine their consideration to issues presented by the parties and not usurp the role of the litigant in the management of the lawsuit").[1]

[1] This Court's prohibition of *sua sponte* rulings derives from the broader principle that issues not raised on appeal are waived. *See*

(Continued on following page)

Here, the Superior Court's unprecedented construction of Rule 1925(b) was never suggested in the Trial Court's opinion, nor by Kanter on appeal, nor in any of the appellate briefs, nor even by the Superior Court panel at oral argument. Thus, the Superior Court not only violated this Court's long-standing prohibition against *sua sponte* decisions, but in so doing established a precedential yet erroneous interpretation of Rule 1925(b) that stripped defendants of their appellate rights.[2]

Indeed, though its *sua sponte* declaration of a wholesale waiver of appellate rights, without providing notice or any opportunity to be heard, the Superior Court obliterated all semblance of the Spector Firm's due process rights, as guaranteed by both the United States and Pennsylvania Constitutions, along with the constitutionally-mandated right of access to the appellate courts. *See*

Sheppard v. Old Heritage Mutual Ins. Co., 492 Pa. 581, 591, 425 A.2d 304, 309 (1980) (failure to pursue issue on appeal is just as effective a waiver as failure to initially raise issue). The Superior Court has itself recognized and followed this principle on many occasions. *See, e.g., Commonwealth v. Richter*, 257 Pa. Super. 260, 262, 390 A.2d 812, 813 (1978); *Sun Oil Co. of Pa. v. Bellone*, 292 Pa. Super. 341, 345, 437 A.2d 415, 417 n. 5 (1981) ("Since this issue has not been raised by appellant, at any time, it would be improper for us to raise it *sua sponte*.").

[2] In limited circumstances, appellate courts have the authority to quash an appeal even where the appellee fails to assert the grounds for dismissal. For example, under Pa.R.A.P 2101; an appellate court may quash an appeal where an appellant's brief or reproduced record fails to conform in material respects to the requirements of the Rules of Appellate Procedure. Likewise, under the *Lord* Court's bright-line waiver rule, an appellate court may unilaterally dismiss an appeal if the appellant fails to file a Rule 1925(b) statement. *See Commonwealth v. Butler*, 571 Pa. 441, 812 A.2d 631, 633 (2002) (waiver under Rule 1925(b) is automatic). Here, in contrast to these examples, the Superior Court's limitation on Rule 1925(b) statements was neither mandated by Rule 1925 nor derived from a bright-line standard previously established by this Court.

U.S. Const. amend. XIV, § 1; Pa. Const. Art. 1, § 1. *See also* Pa. Const. Art. 5, § 9 ("[t]here shall be a right of appeal in all cases . . . from a court of record . . . to an appellate court").

The logic of *Weigand* and its progeny has particular force in "the Rule 1925 scenario," in which an appellant has a constitutional right to frame its own issues on appeal:

> If we allow review of cases where a trial judge determined which issues an appellant could raise and how to frame those issues, that appellant would potentially lose a variety of protected constitutional rights. This procedure that appellant urges upon this Court would undermine the appellate process in that it severely limits the types and nuances of argument that appellant may raise on appeal.

Commonwealth v. Steadley, 748 A.2d 707, 709 (Pa. Super. 2000). *See also Humes v. Eckard Corp.*, 807 A.2d 290, 296 (Pa. Super. 2002) (*Lord's* waiver rule, which prohibits trial court from preparing opinion based on speculation as to issues appellant might raise on appeal, premised on concept "that a plaintiff/appellant must be autonomous").

In refusing to address the merits of the Spector Firm's appeal, the Superior Court thus "violate[d] the well-established and jurisprudentially sound rule that a court should not *sua sponte* raise an issue not properly placed before it by the litigants." *Commonwealth v. Mimms*, 477 Pa. 553, 556 n. 5, 385 A.2d 334, 335 n. 5 (1978) (citing *Reed v. Sloan*, 475 Pa. 570, n. 4, 381 A.2d 421, n. 4 (1977)). *See also Commonwealth v. Branham*, 467 Pa. 605, 359 A.2d 766 (1976); *Commonwealth v. Capitolo*, 508 Pa. 372, 381-82, 498 A.2d 806, 810-11 (1985) ("A matter not raised

in the trial court cannot be considered on appeal, and Superior Court's *sua sponte* raising of the applicability of Section 510 to this case was patent error.").

Moreover, even if the Superior Court's construction of Rule 1925(b) could be somehow sustained, it erred in applying its unprecedented waiver analysis to the case and litigants before it. Recognizing that it was establishing a new interpretation of Rule 1925(b), the *Lord* Court made clear that its waiver rule would apply prospectively only, and not to the case before it. *Id.* at 420, 719 A.2d at 309 (applying automatic waiver rule "from this date forward").

Particularly when application of a new rule would result in a waiver or dismissal of a case, prospective application is the proper and just approach. *See Schreiber v. Republic Intermodal Corp.*, 473 Pa. 614, 622, 375 A.2d 1285, 1289 (1977) (prospective application appropriate where "decision establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression whose resolution was not clearly foreshadowed") (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)). *See also Williams v. Smithe Machine Co., Inc.*, 395 Pa. Super. 511, 577 A.2d 907, 910 (1990) ("Given the dearth of case law interpreting the provisions of 42 Pa.C.S. § 5103, appellants' initial partial compliance with the statute's requirements, and eventual complete compliance, we do not believe that appellants should suffer the harsh result of dismissal of their cause of action.").

There can be no doubt that the Superior Court's unprecedented limitation on Rule 1925(b) statements reflects a holding of "first impression whose resolution was not clearly foreshadowed." But in contrast to the *Lord*

Court's prospective application of its waiver rule, the Superior Court applied its *sua sponte* interpretation of Rule 1925(b) to the case and litigants before it, without the benefit of briefing or argument on the issue.

Thus, nothing could be more clear than that the Superior Court "usurped the role of the litigant[s] in the management of the lawsuit" and established an unprecedented interpretation of Rule 1925(b) depriving the Spector Firm of its appellate rights. The Superior Court's ruling below represents a wholesale denial of due process which this Court must promptly remedy.

* * *

2

No. 05-553

IN THE SUPREME COURT OF THE UNITED STATES

Spector Gadon & Rosen, P.C.
and Alan B. Epstein, Esquire
Petitioners

v.

Nancy Kanter, Esquire
Respondent.

On Petition For Writ of Certiorari to the Superior Court of Pennsylvania, Philadelphia Office

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the United States Supreme Court have jurisdiction over the constitutionality of a state trial court's punitive damage award where the issue was not raised before the state supreme court?

2. Where a state court appellant fails to comply with a rule of appellate procedure explicitly providing that waiver may be a consequence of noncompliance, does waiver of the appeal for noncompliance constitute a due process violation?

PARTIES TO THE PROCEEDING

All parties are listed in the caption of the case.

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COUNTERSTATEMENT OF THE CASE

Petitioners are attorneys who, defending themselves on a *pro se* basis, abused the legal system at every turn.[1] As a last resort, they appeal to this Court on "due process" grounds, having waived their state court appellate right by noncompliance with an appellate rule. Their noncompliance consisted of identifying, for purposes of the trial court drafting a post-trial opinion, over 104 issues they intended to raise on appeal. App. 12-13, 63. This tactic violated the appellate rule requiring that the appellant's identification of issues to the trial court be "concise" on peril of waiver. Even apart from any reasonable standard of concision, Petitioners knew they could not possibly have briefed so many issues. In addition to being impossibly unwieldy, such an appeal would have caused Petitioners to violate another appellate rule setting a one-page limit to the appellate brief's articulation of issues. App. 14. Now, on a Petition for Writ of Certiorari, Petitioners seem to think that the Fourteenth Amendment of the United States Constitution requires a bright-line number, beyond 104, that must stand as a substitute for the word "concise" in the applicable rule.

In their Statement of the Case, Petitioners ignore their persistent abuse of the trial and appellate systems, their flouting of the due process received. Among other things, they 1) obstructed and delayed the trial with baseless objections; 2) violated numerous discovery orders and even a contempt of court order, purposely derailing the punitive damage trial; 3) deceived the jury at the punitive damage trial by promising that they would satisfy any compensatory award the jury made to

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[1] Spector, Gadon & Rosen has no connection to Senator Arlen Specter or to any relative of Senator Specter.

Respondent; 4) breached an agreement with Respondent and with the trial court that they would not, at the post-trial phase, file a praecipe for the entry of a judgment until the trial judge had time to draft an opinion; 5) filed a frivolous writ with the appellate court seeking to stop the trial court from enforcing its orders; 6) filed eight appeals with the intermediate appellate court (and several with the Pennsylvania Supreme Court); 7) identified 104 issues plus sub-issues for appeal.

This case originated with abuse of the system. Petitioners refused to pay an agreed upon attorney referral fee to Respondent Nancy Kanter after Petitioners settled an underlying case with little work for $4.3 million.[2] Kanter, owed $431,000, brought claims in breach of contract and conversion, and the jury found in her favor on both counts.[3]

Petitioners blocked progress throughout the trial by repeatedly interjecting baseless objections. App. 87. This exasperated the jury and trial court. *Id.*

Petitioners also frustrated the process by treating their

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[2] Contrary to the Petition at 2, and as Petitioners well know, Kanter was never appointed the guardian of Tara M. the juvenile plaintiff in the underlying case. Kanter was appointed Tara M.'s child advocate in 1991. In 1998, after publicity resulted in toy and cash donations for Tara M. Kanter was appointed guardian of Tara M.'s estate for the sole purpose of overseeing the toys and $850 in cash.

[3] Prior to the Tara M. settlement, Kanter was repeatedly reassured by Petitioners that she would receive the promised referral fee. Epstein, for example, reassured her that the merger of his practice with Spector Gadon & Rosen would not impact her right to the referral fee.

discovery obligations with unusual disdain during the course of the trial. *Id.* The trial on punitive damages, based on the conversion claim, had been severed from the liability and compensatory damage aspects of the trial, and Kanter had all along been seeking discovery on punitive damages. Five times during the first phase – on April 30, May 1, May 3, May 6 and May 8, 2002 – the trial court ordered Petitioners to produce wealth and income statements in the event the case proceeded to the punitive damage phase. In response to the first order, Petitioners protested that they were not on notice that punitive damages might be a trial issue. But the court cut short that claim by reference to the punitive damage demand in the Complaint. Thereafter, Petitioners simply refused to comply. App. 87-91.

The trial court responded to their noncompliance on the first day of the punitive damage trial: "I indicated tax returns [be produced];" "I requested you last Friday, for both you and the defendant Spector Gadon, to present any and all net worth documents including tax returns, financial statements, et cetera;" "I find that you have violated the Court order;" "I said tax returns. . . . . And I said any and all financial statements;" "I find that you have violated the Court order and any common-sense reading of it;" "I find at least initially that this is a violation of the court order."

In its opinion, the trial court concluded, "Their tactics required numerous conferences outside of the presence of the jury and turned what should have been a several day trial (which they previously informed the jury at voir dire) into six days of testimony on the compensatory damage phase of the trial alone." App. 87. The court found that Petitioners' abuse of the system wore the jury to its limit so that it could no longer give Kanter's case its fair attention. *Id.*

Throughout this process, Petitioners, acting on their

own behalf, answered the court's orders with disingenuous professions of ignorance and misleading statements. App. 88-91. Not surprisingly, Kanter and the court were not the sole victims of this sanctionable deceit. The jury was treated to the same conduct during the punitive damage phase, though, unlike Kanter and the court, it had no way of knowing that it was being misled. As part of their punitive damage testimony, Petitioners falsely and repeatedly promised the jury that they would pay Kanter whatever the jury awarded as compensatory damages. App. 83-87. The court found that these professions were intentionally misleading and deceitful. App. 86-87. And the court observed that Petitioners were successful in their deceit, causing the jury to believe that Petitioners would indeed resolve the dispute with Kanter by immediately complying with the jury's verdict. *Id.* The jury, therefore, found that Petitioners were not, in fact, engaging in conduct that was outrageous, malicious, wanton, reckless, wilful or oppressive. *Id.* How could Petitioners be obstreperous if they were going to do whatever the jury said? Thus, the Petitioners duped the jury into finding that the punishment of punitive damages was inappropriate.

Remarkably, Petitioners' fraud upon the court ran even deeper. Under Pa. R. Civ. P. 227.4, a party can file a "praecipe" requiring that the "prothonotary," the state equivalent of the clerk, enter judgment if the court has not ruled on a post-trial motion within 120 days of its filing. The rule allows the parties to extend this deadline by agreement. Because counsel for Petitioner Spector, Gadon & Rosen had a prepaid vacation, she needed an extension of the post-trial briefing schedule, which, in turn, would require extending the 120-day deadline. App. 2-3.

To accommodate Petitioners, the parties executed a

written agreement extending the deadline.[4] App. 2-3, 4-7. Later, the agreement was even reaffirmed on the record, establishing a March 14, 2003 due date. *Id.* On the record, the Petitioners explicitly agreed to the new deadline. *Id.* In breach of the agreement, presented to the court and formulated to accommodate Petitioners, Petitioners filed their praecipe to enter judgment on January 8, 2003. Their objective in breaching the agreement was to prevent the court from ruling on pending motions for additur, sanctions, pre- and post-judgment interest, and punitive damages, and to prevent documentary and deposition discovery on Petitioners continuing contempt. App. 3-4, 21-23. They hoped that by taking a snap judgment they could cap damages at the inadequate jury award of $215,000.

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[4] The agreement stated:

> Each of the undersigned parties, through their attorneys, agree to an extension of time to file briefs and argue Post Verdict Motions and or Hearings for Contempt.
>
> Any extension of time will also include our agreement to extend the time limits of Rules of Pa. Procedure 227.4, which at present has a cut off date of September 16, 2002.
>
> The Court will change the briefing schedule to coincide with the receipt of the Notes of Testimony.
>
> The request to extend the time was initially requested by defendant Spector Gadon & Rosen due to the lack of the Notes of Testimony.

The trial court ordered additional discovery from Petitioners on January 10, 2003 and again on January 15, 2003. App. 21-23. By this time, Petitioners were in contempt of contempt. App. 25.

In a continuing effort to evade their obligations, Petitioners filed with the appellate court a "Writ of Prohibition Restraining the Honorable Joseph I. Papalini from exceeding jurisdiction of his court...." App. 25. Petitioners' theory behind this writ was that Petitioners' notices of appeal, in breach of their agreement, had fortuitously placed Petitioners beyond the trial court's reach. But under unambiguous rules of appellate procedure, the trial court retains jurisdiction over trial-related issues. The Writ was denied shortly thereafter. App. 25, 7-8, 29.

By February 2003, Petitioners had filed **seven** direct appeals in this case, testing the outer limits of appellate rights, which, ironically, they now complain they were denied in violation of the United States Constitution.[5]

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[5] By February 2003, Petitioners took the following appeals.

On January 16, 2003, they filed the Writ of Prohibition. This appeal was docketed at Pa. Super 5 EDA 2003.

On January 16, 2003, they appealed December 30, 2002 discovery order decreeing responses by Jan. 31, 2003. The appeal was quashed after briefing.

On January 9, 2003, they appealed the January 8, 2003 discovery order. Their appeals were docketed at Pa. Super. 186 & 187 EDA 2003. The appeals were quashed after briefing.

On January 16, 2003, they appealed the January 10, 2003 discovery order. Their appeals were docketed at Pa.

On March 10, 2003, the trial court ruled on pending post-trial motions. App. 26-28. It granted Kanter's motions for additur, for pre- and post- judgment interest, for sanctions, and for contempt citations. App. 26-28. It also ruled on Kanter's motion for a new trial on punitive damages. Regarding the latter, it found that Petitioners' deliberate, deceitful delay, non-disclosure of requested information in violation of court orders, and their deliberately misleading the jury had corrupted the punitive damage phase. App. 81-91. It gave Kanter a choice of accepting approximately triple the amount the jury had originally awarded, $645,000, or a new trial on punitive damages.[6] *Id.*, App. 26-28.

Super. 300 & 301 EDA 2003. Both appeals were quashed before argument on the motion to quash.

On January 15, 2003, they appealed the January 15, 2003 discovery order. Their appeals were docketed at Pa. Super. 299 & 302 EDA 2003. Both appeals were quashed before argument on the motion to quash.

This was not the end of their appeals. They took one more appeal to the intermediate appellate court, requested reconsideration from the appellate court, and took five appeals to the Pennsylvania Supreme Court.

[6] Petitioners are incorrect in their assertion that they did not receive a fair trial on punitive damages. Petition 16. Rather, they repeatedly and consistently abused the due process afforded them, burdening the court and prejudicing Respondents. Their corruption of the process was deliberate. They were not deprived of a hearing but sought to deprive others of a hearing.

Petitioners are also incorrect that the trial judge gained some substantive information, to which they were not

Pursuant to the March 10 Order, Kanter opted for the $645,000 by filing a praecipe for the Prothonotary to enter judgment, which the Prothonotary did the same day, March 12, 2003. App. 29.

Petitioners filed a Notice of Appeal (their eighth) from the March 10, 2003 Order, even though it left open the option of a new trial.

While proceedings before the trial court were coming to a close, Petitioners' abuse of the system was not. On May 8, 2003, the court ordered the parties to file a statement of matters complained of on appeal, pursuant to Pa. R. App. P. 1925(b). That rule provides:

> The lower court forthwith may enter an order directing the appellant to file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on the appeal no later than 14 days after the entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling or other matter complained of.

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privy, when he privately spoke to the jury. Petition 14. Rather, he confirmed what he had already observed – that Petitioners had dragged out the trial with sanctionable conduct and exasperated a jury that was expecting to finish its work sooner. App. 87, n. 5. Petitioners' expectations that they have a right to challenge the jurors' communications to the court through cross examination or to offer evidence contrary to the jury's expressions of exasperation is bizarre. Petition 14. In any case, this issue was not raised below.

Although Petitioners' time was extended from 14 days to a full month, they made no effort to be concise or even discriminating. App. 63. Instead, Petitioners designated virtually every perceived issue and pseudo-issue in the entire case. Each Petitioners' statement was fifteen pages. App. 12. One Petitioner designated 49 issues, and the other, 55, and each incorporated the others' issues, for a total of 104, excluding multiple sub-issues. App. 12-13, App. 31-63. "This went beyond lawyering," the trial court found, "and was *another attempt to overwhelm and overburden this court and pervert the court system.*" App. 63. [Emphasis in the original.] It found that such a designation breached Petitioners' duty of fair dealing with the Court. App. 94.

The appellate court held that Petitioners' noncompliance "... effectively precluded appellate review...." App. 13. It found that the number of issues was "preposterous" and would necessarily cause a violation of other appellate rules, such as the page limit on issues designated in the Brief of Appellant.[7] App. 14. It found that Petitioners' noncompliance was not innocent, or merely negligent, but that they committed "... misconduct when they attempted to overwhelm the trial court...." App. 14. The appellate court agreed with the trial court that Petitioners breached their duty

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[7] Even though Petitioners ultimately appealed fewer issues than they designated, they violated the one-page rule in any event. App. 15 -16.

Petitioners' statement that they "honed their focus to the most significant [of the 104] issues" in their appellate brief since they now had "the benefit of the trial court's Opinion" is disingenuous. Petition 17. They were capable of "honing their focus" sooner and Rule 1925(b) demanded as much.

of good faith and fair dealing with the court. App. 15. Its opinion was unmistakable:

> We can only conclude that the motive underlying such conduct is to overwhelm the court system to such an extent that the courts are forced to throw up their proverbial hands in frustration. While such tactics may prove successful in other situations, we are unwilling to succumb to such chicanery and will not reward such misconduct.

App. 16. Pursuant to Pa. R. App. P. 1925(b), the appellate court ruled that Petitioner's noncompliance, committed on top of all the other procedural abuses, constituted a waiver of the appeal.

Before appealing to the Pennsylvania Supreme Court, Petitioners sought reconsideration of that ruling, which was denied. App. 18.

On their appeal to the Pennsylvania Supreme Court, Petitioners raised only the issues under 1925(b). They never raised the Constitutionality of the trial court's punitive damage decision. App. 111-116. The Supreme Court denied their Petition for Allowance of Appeal.

Thereafter, Petitioners filed four more appeals with the Supreme Court, employing various tactics to prevent execution.[8]

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[8] These appeals were dockets at Pa. Supreme 110 EDA 2005 - 113 EDA 2005.

REASONS FOR DENYING THE WRIT

A. This Court Lacks Jurisdiction Over Any Questions Concerning The Trial Court's Punitive Damage Award Because The Issue Was Not Raised Before The Pennsylvania Supreme Court.

28 U.S.C. § 1257(a) allows for Supreme Court review of final judgments or decrees rendered by the highest court of a state in which a decision could be had. Moreover, the question must be one of federal law, in this case the Constitution. *Id.* The precise Constitutional question must be raised with the state supreme court to maintain jurisdiction over the question in this Court. *Howell v. Mississippi*, ___ U. S. ___, 125 S. Ct. 856, 858-859 (2005); *Adams v. Robertson*, 520 U.S. 83, 117 S. Ct. 1028 (1997); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 464, 113 S. Ct. 2711, 2723-2724 (1993).

Petitioners did not raise any argument whatsoever before the Pennsylvania Supreme Court that in any way considered the punitive damage award to constitute a violation of a federal due process right. App. 111-116. Thus, this issue, which is encompassed within Petitioners' Question Presented and comprises the bulk of their Petition for Writ of Certiorari, is not before this Court. The only purported federal issue raised before the Pennsylvania Supreme Court – and *barely* raised – is whether Petitioner Spector, Gadon & Rosen's waiver of an appeal by virtue of its designation of over 104 appellate issues and application of Pa. R. App. P. 1925(b)'s requirement of concision on peril of waiver constitutes a

federal due process violation.[9] App. 100-101.

B. The Questions Presented Do Not Concern The Constitutionality Of A State Statute Or Even Any Class Of Litigants Either Within Or Without Pennsylvania But Petitioners Alone.

Petitioners fail to establish – indeed, they do not even make the effort to establish – by any empirical examples that the waiver they complain of has any repercussions for anyone other than themselves. See Petition 17-19. Petitioners identify no other litigants, either within Pennsylvania or elsewhere, affected by a ruling that a designation of 104 issues for appeal is insufficiently concise. There is no class of litigants affected. Nor is the constitutionality of a state statute at issue. See 28 U.S.C. § 1257(a) (establishing jurisdiction where the validity of a state statute is called into question under the Constitution). Surely, petitioners have not established under Supreme Court Rule 10(b) that "a state court ... has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

Petitioners merely speculate that Pa. R. App. P. 1925(b) "will necessarily be applied in a discriminatory fashion." Without allowing the Pennsylvania appellate courts the chance to amplify the meaning of "concise" (to the extent the holding that more than 104 issues is not concise needs amplification),

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[9] The Constitutionality of the waiver was never raised on behalf of Epstein, who was separately represented before the Pennsylvania Supreme Court. Thus, he has no issue whatsoever properly before this Court.

Petitioners merely assume that the ruling ensures "the likelihood of inconsistent results." But even the "likelihood" of "inconsistent results" – if this was indeed a realistic assessment – is insufficient for Supreme Court review. In short, Petitioners apply to this Court for correction of a perceived error affecting them alone.

C. Appellate Rights Can Be Waived For Procedural Defects.

Petitioners' perceived error is not even of constitutional dimensions. For one, the right to an appeal is not essential to due process. *Lindsey v. Normet*, 405 U.S. 56, 77, 92 S. Ct. 862, 876 (1972); *District of Columbia v. Clawans*, 300 U. S. 617, 627, 57 S. Ct. 660, 626 (1937); *Ohio v. Akron Metropolitan Park District for Summit County*, 281 U.S. 74, 80, 50 S. Ct. 228, 231-232 (1930); *Luckenbach S.S. v. U.S.*, 272 U.S. 533, 47 S. Ct. 186 (1926); *McKane v. Durston*, 153 U.S. 684, 687-88, 14 S. Ct. 913, 915 (1894).[10]

Moreover, it is well within the province of state courts under the Constitution to set the parameters of appellate review and promulgate, interpret, and enforce their appellate rules to the point of imposing the sanction of waiver of an appeal. *Johnson v. Fankell*, 520 U.S. 911, 918-919, 117 S. Ct. 1800, 1804-1805 (1997) (Supreme Court will defer to state court's application of neutral, non-discriminatory appellate rule.); *Wolfe v. North Carolina*, 364 U.S. 177, 194-195, 80 S. Ct. 1482, 1491-1492 (1960) (It rests with each state to prescribe

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[10] However, the due process and equal protection clauses together prohibit discriminating on the grounds of poverty against criminal defendants seeking to appeal. *Griffin v. Illinois*, 351 U. S. 12, 76 S. Ct. 585 (1956).

the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.); *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43-44, 75 S. Ct. 92, 95-96 (1954) (Statutory right of review can be waived under due process clause for noncompliance with state procedures. "It is an exercise of a state court's inherent power to use its processes to induce compliance...."); *McKane* ("... whether an appeal should be allowed, and, if so, under what circumstances, or on what conditions, are matters for each state to determine for itself."); *Backus v. Fort St. Union Depot*, 169 U. S. 557, 576, 18 S. Ct. 445, 453 (1898) (Where state rule of procedure required that party identify its objections in notice of appeal, party was not deprived of Constitutional rights by state supreme court's refusal to hear issue not identified as an objection.)

Pennsylvania courts recognize that imposing waiver as a sanction for noncompliance with Pa. R. App. P. 1925(b) falls within a court's discretion. *Commonwealth v. Atwood*, 378 Pa. Super. 21, 28, 547 A. 2d 1257, 1260-61 (1988) ("To relinquish our discretion in cases where a party has failed to comply with Pa. R. P. A. 1925 will effectively emasculate the rule and totally undercut the purpose for which it was formulated....")

The idea that Petitioners were blind-sided by the appellate court's exercise of discretion in this case is inaccurate.[11] They should have known at the time they drafted their 1925(b) statements that they would be subjecting themselves to waiver. They should have known at the time of their appeal that waiver would be an issue before the Superior

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[11] It is ironic that Petitioners are complaining that they were surprised that their 1925(b) statement became an issue on appeal when they themselves corrupted the appellate process by designating everything as an issue.

Court. For one, the Rule explicitly allows for waiver in the event of noncompliance and explicitly provides that the designation of issues must be concise. As the Superior Court observed, there are a number of other appellate rules that also indicate that 104 issues with multiple subparts cannot possibly constitute a concise statement.

The touchstone, however, is not simply the number of issues identified but the impact of the designation, whether the designation creates an impediment to meaningful and effective appellate review – an impediment the trial and appellate court determined Petitioners actually intended to create. There was more than ample precedent to establish that Petitioners' designation was noncompliant on this ground. *Commonwealth v. Dodge*, 2004 Pa. Super 338, 859 A. 2d 771, 783-784 (2004) (As in this case, designation of all issues noncompliant, quoting "substantial impediment to meaningful and effective appellate review standard" of *Commonwealth v. Lord*, 553 Pa. 415, 719 A. 2d 306 (1998).); *Commonwealth of Pa. v. Heggins*, 809 A.2d 908, 911 (Pa. Super. 2002) (Too vague an articulation of issues raised in a Rule 1925 statement is the "functional equivalent" of no 1925 statement at all.), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003). See also *Schaffer v. Ames Capital Corp.*, 805 A.2d 534 (Pa. Super. 2002) (Failure to file a Rule 1925 statement compliant with the rule resulted in appellate issue waiver.), *reargument denied*; *Commonwealth of Pa. v. Zingarelli*, 839 A.2d 1064, 1075 (Pa. Super. 2003) (same), *reargument denied, appeal denied*, 856 A.2d 834 (Pa. 2004); *Commonwealth of Pa. v. Rose*, 820 A.2d 164, 169 n.6 (Pa. Super. 2003) (same), *reargument denied; Commonwealth of Pa. v. Seibert*, 799 A.2d 54, 61 (Pa. Super. 2002) (same), *reargument denied; Yoder v. American Travellers Life Ins. Co.*, 814 A.2d 229, 233 (Pa. Super. 2002) (same), *appeal denied*, 573 Pa. 673, 821 A.2d 588 (2003); *Commonwealth of Pa. v.*

Kimble, 756 A.2d 78 (Pa. Super. 2000) (same), *appeal denied*, 556 Pa. 659, 782 A.2d 543 (2001); *Commonwealth of Pa. v. Hunter*, 768 A.2d 1136, 1139 (Pa. Super.) (same), *appeal denied*, 568 Pa. 695, 796 A.2d 979 (2001); *Commonwealth of Pa. v. Payne*, 760 A.2d 400, 405 (Pa. Super. 2000) (same), *appeal denied*, 565 Pa. 641, 771 A.2d 1282 (2001); *Commonwealth of Pa. v. Forest*, 427 Pa. Super. 602, 607-08, 629 A.2d 1032, 1035 (1993) (same), *appeal denied*, 536 Pa. 642, 639 A.2d 28 (1994).

Thus, the appellate court had on many occasions explicitly signaled that good faith compliance with the appellate rules and with 1925(b) in particular was required if an appeal is to be preserved. As stated in *Atwood* at 1260-1261, 28-29:

> To ask this Court to do the exhaustive review . . . with no assistance from the trial judge who sat throughout the proceeding, makes a mockery of appellate review. Our system of appellate review provides an effective expeditious means for fair examination of the issues and resolution of them. It depends, however, on counsel and the trial court adhering to the Rules of Appellate Procedure if the system is not to be paralyzed. While it appears there may be issues of arguable merit to be considered on appeal, we are unable to reach them because of failure to present them properly.

Moreover, Petitioners were on notice that the appellate court could raise appealability *sua sponte*. *Horowitz v. Universal Underwriters Insurance Co.*, 397 Pa. Super 473,

476, 580, A. 2d. 395, 397 (1980).

Not only was it clear from the Rule itself and case law that waiver of their appeal under Rule 1925(b) was a risk and an issue for appeal, but Petitioners knew from the trial court's opinion itself that waiver could be an issue on appeal. For one, the trial court had to spend most of its opinion setting forth the Petitioners' 1925(b) designations. The trial court's "Preliminary Statement" observed that the case is about Petitioner's "*improper behavior*" and that Petitioners had abused Rule 1925(b) in "... another attempt to overwhelm and overburden this court and pervert the court system." App. 63. Thus, the Opinion being appealed signaled that noncompliance with Rule 1925(b) was an issue.[12]

Even if there had been no warning that waiver would be an issue for appellate review, Petitioners have not established, and cannot establish, that a court's *sua sponte* enforcing its procedural rules constitutes a violation of the Fourteenth Amendment. *Link v. Wabash Railroad Company*, 370 U.S. 626, 82 S. Ct. 1386 (1962) (It is not a due process violation for a court to *sua sponte* dismiss a case for non-prosecution even in the absence of a rule that would provide notice of a non-prosecution dismissal.) Rule 1925(b) is designed to assist the trial court in writing an opinion, and, in turn, the appellate court in considering an appeal. The parties should expect that the court will enforce such a rule to protect its own interest even if the parties themselves do not argue noncompliance with the Rule. Indeed, the Rule itself suggests that an appellate court might enforce it on its own initiative: " A failure to comply with such direction may be considered *by*

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[12] Contrary to Petitioners' characterization, the appellate court's application of Rule 1925(b) was not a "new rule," and certainly not one given retrospective impact.

the appellate court as a waiver of all objections to the order, ruling or other matter complained of."

Finally, the waiver must be viewed in context of Petitioners' remarkable history of obstruction. The designation of issues was not an innocent, isolated mistake but yet another affront to the court and the judicial process. The Superior Court discussed other misconduct and saw the designation of issues in that context. App. 1-18.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

RESPECTFULLY SUBMITTED

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In The

Supreme Court of the United States

SPECTOR GADON & ROSEN, P.C.
and ALAN B. EPSTEIN, ESQUIRE,

Petitioners,

V.

NANCY KANTER, ESQUIRE,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners' case for this Court's review is unaffected by anything stated in Kanter's Brief in Opposition. Kanter advances three arguments: (1) petitioners' claim has been waived by failure to preserve it in the state supreme court, Brief in Opposition at 11, (2) petitioners' question presented does not meet the standards for the grant of certiorari, *id.* at 12, and (3) petitioners's claimed due process violation does not raise a substantial federal question. *Id.* at 13-18. The arguments proffered by Kanter suffer from the same deficiencies that have marked her positions and arguments throughout these proceedings – *i.e.*, legally unsupportable argument, distortion of fact[1] and the purposeful diversion from the fundamental issue presented.

Kanter's entire analysis is premised on a mischaracterization of petitioners' claim. Kanter's Brief in Opposition fails to acknowledge that petitioners' claimed due process violation encompasses an accumulation of substantive and procedural deprivations which as a whole have resulted in a constitutionally impermissible punitive damage award against petitioners. Kanter does not, indeed cannot, offer any response to the incontrovertible record that petitioners have been subjected to an enormous punitive damage award, despite a jury verdict in petitioners' favor, without a trial, based on non-record, *ex parte* evidence, and without any appellate review whatsoever as a result of a newly created rule of waiver. Kanter's arguments, based on distortion of the law and the record, offer no real opposition to petitioners' meritorious claim.

Kanter asserts that petitioners have waived their claim, arguing that "the precise constitutional question must be raised with the state supreme court to maintain jurisdiction over the question in this court." Brief in Opposition at 11.

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[1] By way of example, Kanter repeats over and over the falsehood that petitioners raised 104 issues in their Rule 1925(b) statements where petitioner Epstein raised 49 issues and petitioner Spector Gadon & Rosen, P.C. raised 55 issues. In fact, each raised substantially the same issues in their respective Rule 1925(b) statements.

The legal proposition is misstated by Kanter, and indeed is contradicted by the cases she cites. In *Howell v. Mississippi*, 543 U.S. 440, 125 S.Ct. 856, 858 (2005), a petitioner convicted of murder in a Mississippi state court contended his rights under the Eighth and Fourteenth Amendments to the United States Constitution were violated by the court's refusal to require a jury instruction about a lesser included offense in his capital case. No such claim was raised in the state courts. In dismissing petitioner's claim as having been improvidently granted, this Court reiterated the applicable standard under 28 U.S.C. § 1257 that "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to *the state court that rendered the decision we have been asked to review*.'" *Howell*, 543 U.S. at ___, 125 S.Ct. at 858 (emphasis added), *quoting Adams v. Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*).

In this matter, the Superior Court is the "highest court in which a decision can be had" under 28 U.S.C. § 1257, and thus the court to which a petition for certiorari must be directed. *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n.1 (1968) (where higher court declines to exercise authority to grant discretionary review, intermediate appellate court is highest court in which decision could be had). Petitioners seek review of the decision of the Superior Court, which found a waiver of petitioners' federal due process challenge to the trial court's punitive damage award.

Petitioner's claim has been preserved at each stage of the proceeding, including in the trial court, in petitioner's Rule 1925(b) statement, App. 34-35, 48-49, and in the Superior Court, both on appeal, App. 8, 10, 100-01, and in seeking discretionary *en banc* reconsideration, App. 108-09. Prior to the Superior Court's decision, petitioners could only argue the due process deprivation arising from the trial court's *sua sponte* entry of a punitive damage award without a new trial and despite a jury verdict in petitioner's favor. After the Superior Court's decision finding waiver, petitioners asserted the due process deprivation arising from the denial of any review of all of their claims,

including their claim of a due process violation in the award of punitive damages. Petitioners specifically contended:

> As a result, SGR . . . [has] been denied the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article 1, § 1 of the Pennsylvania Constitution. The denial of due process is a result of an effective denial of the right to appeal in that this Court has deemed waived all of the substantive issues raised by SGR without notice or opportunity to be heard. . . .

App. 108.

This Court's jurisdictional requirements required that petitioners seek discretionary review from the Pennsylvania Supreme Court. *Stratton v. Stratton*, 239 U.S. 55 (1915). Petitioners did so by filing a Petition for Allowance of Appeal, raising the only issue available to them – *i.e.*, error, including the denial of federal due process, in the Superior Court's finding of petitioners' waiver of appellate review of all substantive issues on appeal, including deprivation of due process in the award of punitive damages. Petitioners expressly asserted that the Superior Court, "through its *sua sponte* declaration of a wholesale waiver of appellate rights, without providing notice or any opportunity to be heard . . . obliterated all semblance of the Spector Firm's due process rights, as guaranteed by both the United States and Pennsylvania Constitutions, along with the constitutionally-mandated right of access to the appellate courts. *See* U.S. Const. amend. XIV. . . ." App. 113.

There can be no question that petitioners' federal question is a substantial question that has been properly raised in the state courts. Under 28 U.S.C. § 1257, certiorari jurisdiction over state court judgments is vested in this Court where a "federal title, right, privilege or immunity is specially set up or claimed under the Constitution." This Court's jurisprudence instructs that the question is raised if presented to the state court with fair precision and if "the record as a whole shows either expressly or by clear intendment that this was done, the claim is regarded as having been adequately presented." *New York ex rel.*

Bryant v. Zimmerman, 278 U.S. 63, 67 (1928). It is generally sufficient to reference the particular clause of the federal constitution. Herein, petitioners repeatedly preserved their claims under the due process clause of the Fourteenth Amendment.

Finally, Kanter is simply incorrect that the claim has not been preserved by petitioner Epstein. In addition to joining in all arguments raised by petitioner Spector Gadon & Rosen, P.C., *see* Petition for Certiorari at 7 n.2, petitioner Epstein independently raised due process deprivation in the trial court's award of punitive damages. App. 10.

2. At p. 12-13 of the Brief in Opposition, Kanter asserts that petitioners' question presented does not meet the standards for the grant of certiorari, specifically claiming that: (1) petitioners' have not established that the constitutional deprivation complained of will impact litigants other than themselves, (2) the constitutionality of a state statute is not at issue, and (3) petitioners have not established under Supreme Court Rule 10(b) that a "state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Kanter's argument is classic misdirection.

The jurisdiction of this Court to grant a writ of certiorari to a state court is governed by 28 U.S.C. § 1257. Kanter asserts the inapplicability of Section 1257 because petitioners do not question the constitutionality of a state statute. Kanter focuses on a single clause of Section 1257 pertaining to the constitutionality of a state statute to the exclusion of the relevant provision – *i.e.*, permitting review "where any title, right, privilege or immunity is specially set up or claimed under the Constitution. . . ." Petitioners have not asserted that the constitutionality of a state statute is at issue and Kanter's argument in this regard requires no further attention.

Kanter's reference to Supreme Court Rule 10(b) is equally unavailing as she has once again focused on a provision that has no applicability to this petition. Petitioners' claim of an egregious denial of federal due process in the award of punitive damages and denial of any

appellate remedy certainly implicates a right under the federal Constitution as recognized by this Court's prior decisions. *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991). Thus, the considerations relevant to this Court's grant of certiorari are (1) the question presented relates to an important constitutional issue that has in the past merited this Court's attention, and (2) under Supreme Court Rule 10(c), the Superior Court "has decided an important federal question in a way that conflicts with relevant decisions of this Court."

There is no legal requirement that petitioners' due process violation impacts a class (and thus no legal basis for Kanter to raise such an argument), although if such a requirement existed, petitioners would meet it. As petitioners point out, the Superior Court's holding that raising an imprecise number of issues deemed to be "too many" in a Rule 1925(b) statement will result in a waiver of all issues will necessarily impact future litigants. The Superior Court has given no guidance as to how many issues constitutes too many issues and in their prior cases have found no waiver in appeals where more issues were presented than by petitioners herein. Consequently, future litigants and their counsel must face the prospect of culling otherwise meritorious issues from a Rule 1925(b) statement or risk waiver because some appellate court will deem the ultimate number excessive. Future defendants may well face the prospect of a trial judge unilaterally imposing punitive damages after a jury verdict absolving the defendant of liability for punitive damages.

3. Focusing exclusively on the denial of appellate rights, Kanter asserts that, because the right of appeal is not essential to due process, petitioners' claim is not one of constitutional dimension, and that the Superior Court's decision is sustainable as a matter of state law.

Kanter ignores the fact that the denial of appellate rights is just one of the numerous due process violations to which petitioners were subjected and by focusing on the appellate aspect only fails to address the due process

deprivation in the denial of a jury trial on punitive damages and their right to confront the *ex parte* evidence relied upon by the trial court in overturning the jury's defense verdict on punitive damages and unilaterally awarding punitive damages to Kanter.

However, even as to the denial of appellate rights, Kanter ignores the fact that this Court has recognized there are circumstances where due process requires an appeal. This Court's decision in *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), held that due process does not require an appeal where there has been a full and fair trial on the merits, and that in the instant case there has not been a full and fair trial on the issue of punitive damages. Having been denied a full and fair trial on punitive damages, petitioners' appellate rights become the last bulwark against the improper taking of property under government aegis. Thus, the denial of any appellate review constitutes a serious constitutional infringement. This Court's decision in *Oberg* affirmed that appellate review constitutes a significant aspect of due process protection where the constitutionality of an award of punitive damages is at issue by invalidating an amendment to the Oregon Constitution that limited review of such award. The same rationale applies herein.

Kanter also ignores this Court's decisions holding that, where a fundamental right such as a right to appeal is granted under state law, it cannot be denied arbitrarily or capriciously without offending federal due process. *Lindsey*, 405 U.S. at 77. Pennsylvania law guarantees a right to both a jury trial and an appeal. Petitioners have been denied both through arbitrary and capricious action.

The federal cases cited by Kanter, where this Court has declined to review state court appellate procedures, are totally inapposite. In *Johnson v. Fankell*, 520 U.S. 911 (1997), a state employee brought a claim in state court under 42 U.S.C. § 1983. The trial court denied a defendant's motion dismiss based on a qualified immunity defense. The defendants' appeal was dismissed because, in contrast to federal law recognizing a right to an interlocutory appeal of a trial court order denying qualified immunity, the state court did

not recognize such right to an interlocutory appeal. This Court rejected assertions that Section 1983 preempted state law and that the state court was required to interpret the state law in accordance with federal standards. *Johnson* has no applicability herein. There was no claim that state court appellate procedures (not to mention trial procedure) violated the federal Constitution. In fact, the defendant was not deprived of any rights whatsoever – the only issue was the timing of the appeal.

Wolfe v. North Carolina, 364 U.S. 177 (1970) is similarly irrelevant. In *Wolfe*, appellants were African-Americans charged and convicted of trespass for playing golf at a municipally owned facility in North Carolina. During the criminal proceedings, appellants filed a civil suit in federal court alleging a denial of equal protection and obtained an injunction prohibiting the municipality from operating the golf course in a racially discriminatory manner. Appellants appealed their conviction for trespass claiming that the state court was required by the Supremacy Clause of the United States Constitution to give conclusive effect to the factual findings of a federal court in a civil action based on the same events. This Court dismissed the appeal without reaching the merits on the ground that state court record showed that the appellants had not offered the federal findings into evidence in the state court, and therefore the state court properly decided the appeal on independent state grounds. Additionally, this Court gave great weight to the record in the state court criminal proceedings demonstrating that race played no role in the criminal convictions.[2] *Wolfe*, 364 U.S. at

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[2] As stated by this Court in *Wolfe*, 364 U.S. at 196: "From first to last the courts of North Carolina fully recognized that under the Constitution these appellants could not be convicted if they were excluded from the golf course because of their race. The trial judge so instructed the jury, and the Supreme Court of North Carolina so held. . . . Upon the evidence in this case the jury's verdict established that no such racial discrimination had in fact occurred. 'On review here of State convictions, all those matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open

(Continued on following page)

193. A significant factor in this Court's decision was the factual nature of the dispute in the state court and this Court's extreme reluctance to intercede in such factual disputes. *See* Supreme Court Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings. . . .").

In contrast, in this case, the Pennsylvania Courts have completely avoided the federal constitutional issues despite the issues having been properly raised. "It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support." *Wolfe*, 364 U.S. at 185. Ignoring the substantial federal issues, the Superior Court *sua sponte* created a new rule of waiver, contrary to its past decisions, without any notice to petitioners or opportunity for petitioners to be heard, and applied that new rule retroactively in this case. Neither the Superior Court *en banc*, nor the Pennsylvania Supreme Court ever proffered any reason for the non-review of the additional due process issues raised by the Superior Court's decision on waiver. In sum, the federal questions were never addressed by any Pennsylvania court. Additionally, in contrast to *Wolfe*, the issues addressed to the state courts, and to this Court, are legal and not factual issues.

In *Nat'l Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37 (1954), this Court addressed whether a state court was prevented by the due process clause from dismissing an appeal from a money judgment where the appellant defied a court order to deliver bonds held outside the state court's jurisdiction. The Court found no due process violation and recognized the inherent authority of a state court to induce compliance with its orders. *Arnold* is completely distinguishable from this matter as this Court prefaced its decision with the finding that "the petitioner had his day in court. The dismissal cut off only a

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for reconsideration by this Court. Observance of this restriction in our review of State courts calls for the utmost scruple.'" (citations omitted).

statutory right of review after a full trial by judge and jury." *Arnold*, 348 U.S. at 41. In contrast, petitioners herein were denied their right to a trial by the trial court's imposition of an award of punitive damages after a jury verdict in their favor. Moreover, the decision in *Arnold* was premised on defiance of a court order to deliver bonds to the court to act as a supersedeas. Petitioners herein violated no court order with respect to the Rule 1925(b) statements. Third, in *Arnold*, the state court afforded an opportunity to the appellant to comply with the court's order before the sanction of dismissal was imposed. No such opportunity was permitted here and peititoners were sanctioned without any notice or opportunity to be heard.

Kanter further contends that the Superior Court's decision is merely an exercise of its right to interpret state procedural law and impose waiver. Kanter's argument ignores that (1) there existed no statute, rule or case law that imposed a waiver of all issues where "too many" issues were raised in a Rule 1925(b) statement and where no single issue was identified as frivolous or in bad faith,[3] (2) Superior Court panels had held that raising a large number of issues in a Rule 1925(b) statement would not result in waiver of all issues, (3) the issue of waiver was

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[3] The Pennsylvania cases on waiver cited by Kanter in the Brief in Opposition all relate to either (1) a finding of waiver where no Rule 1925(b) statement is filed, or (2) whether the issues presented in a Rule 1925 statement were too vague to allow for effective review. *Commonwealth v. Dodge*, 859 A.2d 771 (Pa. Super. 2004) (no waiver of issues despite appellants incorporation by reference of other documents into his Rule 1925(b) statement); *Commonwealth v. Heggens*, 809 A.2d 908 (Pa. Super. 2002) (an untimely Rule 1925(b) statement that is so vague that the trial court has to speculate as to the issue will result in waiver of the issue); *Schaffer v. Ames Capital Corp.*, 805 A.2d 534 (Pa. Super. 2002) (failure to file any Rule 1925 statement despite court order will result in waiver of appellate issues). Kanter cites 8 additional cases all standing for the same propositions which are not controlling here. Indeed, the cases relating to a failure to file a Rule 1925 statement or the filing of a vague statement are not applicable herein as the matters complained of in petitioners' timely-filed Rule 1925(b) statements, while numerous, are concise, clearly stated with citation to the record, and propounded in good faith. App. 33-35, 48-50.

never brought up by Kanter or by the Court in briefing or at argument and therefore petitioners were never given any notice or opportunity to be heard with respect to waiver[4], and (4) the newly created rule of waiver was applied retroactively contrary to the practice of the Pennsylvania courts to apply a rule of waiver prospectively only. *See, e.g., Commonwealth v. Lord*, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998) (rule that issues not raised in a Rule 1925(b) statement are waived will be applied prospectively only); *Commonwealth v. Pressley*, ___ A.2d ___, 2005 WL 3203051 (Pa. Supreme Court Nov. 9, 2005) (rule that a party waives claims of error based on failure to give a jury instruction submitted by the party, but rejected by the trial court, and as to which no exception is taken after the jury is charged, will be applied prospectively only).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari, or in the alternative, pursuant to Supreme Court Rule 16.1, a summary disposition of the merits of this matter should be granted.

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[4] Kanter asserts that petitioners "should have known at the time they drafted their 1925(b) statements that they would be subjecting themselves to waiver." Brief in Opposition at 14. Such knowledge would border on precognition as neither Kanter nor the Superior Court ever suggested waiver prior to the Superior Court Opinion and Pennsylvania cases have rejected any finding of waiver in the circumstances. *See* cases cited in the Petition for Certiorari at 18 n.5.